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IN THE

Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE,

Petitioner,

—and—

FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioner,

—v.—

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida,

Respondent,

—and—

SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In what circumstances does the First Amendment permit a State to ban petition circulation among voters as they exit polling places? Specifically:

> Did the Eleventh Circuit Court of Appeals improperly extend and apply the plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), when it reversed the district court and upheld the constitutionality of Florida Statutes Section 102.031(4) (2008) as applied to Petitioners' exit-only petition circulation?
>
> Is Florida Statutes Section 102.031(4) unconstitutional as applied to prohibit Petitioners' exit-only petition circulation where the same statute specifically permits media and non-media exit polling?

PARTIES TO THE PROCEEDING

Petitioners are Citizens for Police Accountability Political Committee and Florida State Conference of the National Association for the Advancement of Colored People, Plaintiffs-Appellees below. Respondents are Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida, and Sharon L. Harrington, in her official capacity as Supervisor of Elections, Lee County, Defendants-Appellants below.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Citizens for Police Accountability Political Committee has no parent, subsidiary or affiliated corporations. Petitioner Florida State Conference of the NAACP is a unit of the National NAACP, which is a nonprofit corporation incorporated in New York with its principal place of business in Maryland. It does not issue stock.

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The district court's Opinion and Order is reported as *Citizens for Police Accountability Political Committee v. Browning*, 581 F. Supp. 2d 1164 (M.D. Fla. 2008), and reproduced in the Appendix at 19a-41a.

The district court's Preliminary Injunction is *Citizens for Police Accountability Political Committee v. Browning*, Case No. 2:08-cv-635-FtM-29SPC (M.D. Fla. Aug. 22, 2008), and is reproduced in the Appendix at 42a-44a.

The Eleventh Circuit's opinion is reported as *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213 (11th Cir. 2009), and reproduced in the Appendix at 1a-18a.

The Eleventh Circuit's Order Denying Rehearing is *Citizens for Police Accountability Political Committee v. Browning*, Case. No. 08-15115 (11th Cir. Sept. 9, 2009), and is reproduced in the Appendix at 45a-46a.

JURISDICTIONAL GROUNDS

Jurisdiction is proper in this Court. 28 U.S.C. § 1254(1) (2006). Petitioners, Citizens for Police Accountability Political Committee ("CPAPC") and Florida State Conference of the National Association for the Advancement of Colored People ("Florida NAACP") (collectively "Petitioners"), seek review of the Eleventh Circuit Court of Appeals' opinion reversing the district court's grant of a preliminary

injunction. The district court entered the preliminary injunction after a hearing at which the court found, among other things, that Petitioners had a substantial likelihood of success on the merits of their as-applied constitutional challenge to Florida Statutes Section 102.031(4)(a)-(b) (2008). The Eleventh Circuit reversed the district court order on June 25, 2009, and denied Petitioners' timely motion for rehearing on September 9, 2009. Petitioners' initial deadline for filing this Petition for Writ of Certiorari was December 3, 2009, but Petitioners sought and were granted an extension of time to January 15, 2010 to file it.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section One, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (2006):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Florida Statutes Section 102.031(4)(a)-(b) (2008):

(4)(a) No person, political committee, committee of continuous existence, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, or early voting site. Before the opening of the polling place or early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries.

(b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" shall not be construed to prohibit exit polling.

STATEMENT OF THE CASE AND FACTS

Introduction

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Roth v. United States, 354 U.S. 476, 484 (1957). Contrary to this principle, the State of Florida interferes with the exchange of ideas by banning the solicitation of petition signatures near polling places from persons both before and *after* they have voted. Fla. Stat. § 102.031(4)(a)-(b) (2008). This prohibition imposes severe burdens upon Petitioners' ability to have their proposed amendment placed on a ballot. *See Buckley v. Amer. Constitutional Law Found., Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J. concurring) (restrictions on petition circulation "plainly impose a 'severe burden' ").

The Eleventh Circuit's opinion, which reversed the granting of a preliminary injunction by the district court and which upheld the constitutionality of Section 102.031(4)(a)-(b) as applied to Petitioners' speech, is based upon an erroneous legal standard and creates significant confusion about the protections afforded by the First Amendment. The Court should review this case because it presents important questions of constitutional law that this Court has not yet addressed, but should.

The Challenged Law

In 1977, the Florida Legislature for the first time sought to regulate petition circulation outside of polling places. The impetus behind this restriction was a disgruntled Legislature reacting to the Governor's "successful drive to place a financial disclosure law on the ballot through the initiative process." *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928, 929 (M.D. Fla. 1984). In 1984 and again in 1988, petition circulators and media exit pollsters brought a

series of successful constitutional challenges to the precursors of Section 102.031(4)(a)-(b). *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) (petition circulation); *CBS, Inc. v. Smith*, 681 F. Supp. 794, 796 (S.D. Fla. 1988) (exit polling); *Fla. Comm. For Liability Reform v. McMillan*, 682 F. Supp. 1536, 1540-42 (M.D. Fla. 1988) (petition circulation); *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928, 934 (M.D. Fla. 1984) (petition circulation); *Clean-Up '84 v. Heinrich*, 582 F. Supp. 125, 127 (M.D. Fla. 1984) (petition circulation).

Because Florida's laws regulating petition circulation and exit polling were constitutionally infirm, Florida revised its laws so that, between 1989 and 2005, Florida permitted such activity within certain areas near polling places. *E.g.*, Fla. Stat. § 102.031 (1990). As a result, from 1989 to 2005, Florida's polling place laws were not challenged in court.

In 2005, the Florida Legislature enacted a new statute that prohibited petition circulating and exit polling, among others things, within a 100-foot zone around polling place entrances. 2005 Fla. Laws Chap. 2005-277 § 54 (codified at Fla. Stat. § 102.031(4)(a)-(b) (2006)). In 2006, a consortium of media entities successfully challenged that statute as applied to media exit polling, and the United States District Court for the Southern District of Florida enjoined its enforcement. *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365, 1366 (S.D. Fla. 2006). The State did not appeal that ruling. In 2008, the Florida Legislature amended the statute to permit exit polling. 2008 Fla. Laws Chap. 2008-95 § 25 (codified

at Fla. Stat. § 102.031(4)(a)-(b) (2008)). The statute enacted in 2008 (the "Challenged Law") provides no definition of "exit polling" and permits anyone, not just the media, to engage in "exit polling." (App. at 24a.)

With the exception of "exit polling," however, the Challenged Law forbids the solicitation of voters within 100 feet of Florida polling places and early voting sites (the "No Approach Zone"). *See* Fla. Stat. § 102.031(4)(a). The Challenged Law defines "solicitation" to include various types of speech directed at voters, including "seeking or attempting to seek a signature [from a voter] on any petition." *Id.* § 102.031(4)(b).

Petitioners' First Amendment Speech

Petitioners are the advocates for and circulators of a petition seeking an amendment to the Fort Myers, Florida, City Charter. (R 1:2, 5.)[1] The proposed amendment's purpose was to create a citizens' oversight panel for the City's police department. (App. at 20a.) Petitioner CPAPC began circulating the petition in August 2007. (*Id.*)

Because of the high concentration of registered voters at polling places, CPAPC sought to gather signatures at polling places during the Presidential Preference Primary held on January 29, 2008. (R 1:5.) CPAPC's efforts were stymied, however, because instead of being able to discuss their petition with

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[1] The Record will be cited as "(R#:Pg#.)."

voters, CPAPC petition circulators could only watch as voters parked their cars within the No Approach Zone, entered the polling places, and returned to their cars. (*Id.* at 5-6.)

In April 2008, the Florida NAACP joined CPAPC in circulating the petition. (*Id.* at 6.) Despite their combined efforts, by summer 2008 Petitioners had not obtained the required number of signatures from the City's registered voters. (*Id.*)

The District Court Proceedings

On August 11, 2008, pursuant to 42 U.S.C. § 1983 (2006), and in anticipation of the August 26, 2008 primary election, Petitioners filed in the United States District Court for the Middle District of Florida a Verified Complaint and Motion for Preliminary Injunction supported by affidavits and attached exhibits. (R 1,2.) For purposes of this Petition for Writ of Certiorari, Petitioners' most important claims were for a declaration that the Challenged Law was unconstitutional as applied to Petitioners' efforts to obtain signatures from *exiting voters* and for an injunction against enforcement of the Challenged Law. (R 1:10-12.) Respondents filed a response to the Motion, including affidavits (R 11), and the district court heard oral argument on August 21, 2008. On August 22, the district court issued an Opinion and Order as well as a Preliminary Injunction prohibiting enforcement of the Challenged Law against Petitioners' exit petitioning during the August 26, 2008 primary election. (App. at 19a-44a.)

Petitioners' Evidence in the District Court

In the district court, Petitioners presented a variety of statistical, geographic, and affidavit evidence demonstrating that polling places are the best location to gather petition signatures, that the Challenged Law severely burdened Petitioners' efforts to gather petition signatures, and that petition circulation had not caused voter intimidation, fraud, or any other electoral abuses near Florida's polling places.

Petitioners presented three different sets of statistical evidence, all of which were gathered during the period when Florida permitted petition circulation and other types of speech within the No Approach Zone. The first set of statistics showed an increase in voter participation from the 2000 to the 2004 presidential elections both statewide and in Lee County, where Fort Myers is located. (R 2-3:1-2.) The second set contained a review of more than 5,000 complaints logged in the Election Incident Reporting System from Florida voters during the 2004 presidential election, none of which involved petition circulation, even though petition circulation was permitted near Florida polling places at that time. (*Id.* at 2-3.)

The third set of statistics contained a survey conducted during the 2004 presidential election regarding voters' experiences in Florida. (*Id.*) No voters mentioned petition circulation as a problem near polling places. (*Id.*)

Petitioners also provided the district court with the results of a public records request to Supervisor

Harrington for "[a]ll voter complaints regarding activity outside the polling places in Lee County, Florida, including, but not limited to exit polling, petition circulation, and other forms of solicitation, from January 1, 2000 to the present." (*Id.* at 4.) Supervisor Harrington's response provided only one e-mail string, and that e-mail string did not relate to petition circulation. (*Id.*) In other words, for more than eight years, including during a period of more than four years when petition circulation was permitted, there were no public records of complaints in Lee County regarding petition circulation at polling places.

Petitioners further submitted to the district court maps of three polling places in Fort Myers showing that the No Approach Zones not only encompassed many parking places, but also included public sidewalks and public roads. (*Id.* at 4-5.)

Finally, Petitioners provided the district court with the declaration of Dr. Matthew Corrigan, a professor and department head from the University of North Florida Department of Political Science and Public Administration, which concluded that polling places were the best place for petition circulation based upon three findings. (R 2-2:1-2.) First, only registered voters from Fort Myers may vote in polling places within the City, and those voters are the same people needed to sign a petition to amend the Fort Myers City Charter. *See* Fla. Stat. § 166.031(1) (2008). Second, citizens who are politically active in their community, including those who vote, are twice as likely to sign a petition as those who are not politically active. (R 2-2:2.) Third, as with exit

polling, the greater the distance from a polling place that petition circulators are made to stand, the less likely they are to be successful. (*Id.* at 3.)

Respondent's Evidence in the District Court

In contrast to Petitioners' evidence, Respondents provided only anecdotal affidavit evidence. (R 11:16.) Supervisor Harrington proffered her own affidavit, which had attached to it a 2006 affidavit of then Supervisor Browning.[2] (R 11-2.) Supervisor Harrington stated that in her experience, "any diminution of th[e] 100 foot protection will disrupt voters, cause increased dissatisfaction with the voting process, and suppress voter turnout." (R 11-2:3.) Secretary Browning's affidavit reached a similar conclusion. (*Id.* at 7.) Both affidavits discussed Respondents' beliefs regarding the "cumulative effect" of activity outside of polling places and the effect on voters having to "run the gauntlet." (*Id.* at 2, 7.) Neither affidavit identified any specific voters who had complained or specific problems that had occurred at any polling place. Nor was either affidavit supported by any documentary evidence.

The District Court Grants the Preliminary Injunction

Because the Challenged Law is a content-based restriction on First Amendment rights – *i.e.*, a

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[2] The 2006 affidavit originally had been offered by then Supervisor Browning in a lawsuit over the predecessor to the Challenged Law, *CBS Broadcasting, Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006).

restriction on Petitioners' rights of free speech and association – the district court looked to this Court's plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), for guidance on how to assess it. Utilizing the strict scrutiny test employed by the *Burson* plurality, the district court first found that the State has a compelling interest in conducting elections with integrity and reliability and in protecting voters from intimidation, confusion, and election fraud. (App. at 26a.) But, the district court concluded, Respondents did not show that the Challenged Law satisfied either of the other strict scrutiny requirements. (*Id.* at 35a.)

Specifically, the district court explained that there was ample historical evidence of electoral abuses caused by candidates and campaign workers seeking to influence the outcome of elections. (*Id.*) But,

> [t]he evidence submitted by the parties in this case . . . fails to establish electoral abuses perpetrated by other exit solicitors or exit polling. Therefore, at this stage of the proceedings, there has not been a sufficient showing that the restriction on exit petitioning is necessary.

(*Id.*) The district court also found that, because of the nature of Petitioners' speech – peaceful, orderly, non-disruptive, and directed only at exiting voters – the Challenged Law was not narrowly tailored. (*Id.* at 36a.)

Based upon these findings, the district court issued the preliminary injunction prohibiting enforcement of the Challenged Law against

Petitioners' exit petitioning at polling places in Lee County on August 26, 2008.[3] Respondents appealed.[4]

The Eleventh Circuit Reverses

The Eleventh Circuit reversed the district court's preliminary injunction. (App. at 3a.) After discussing the *Burson* decision and noting that, because of factual differences, *Burson* did not bind it, the Eleventh Circuit undertook the three-pronged strict scrutiny analysis. (App. at 7a-17a.) The appellate court found that the State's compelling interest was the same as in *Burson*: "(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process." (App. at 11a.) In contrast with the district court, however, the Eleventh Circuit did not consider the evidence presented in the lower court in evaluating the necessity requirement.[5] Instead, it rejected

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[3] The district court also found that Petitioners had satisfied the other requirements for granting a preliminary injunction.

[4] After circulating their petition on August 26, 2008, Petitioners gathered the necessary number of signatures to place their issue on the ballot. As a result, the district court, on December 1, 2008, found that there was no live case or controversy pending and dismissed the case as moot. (R 39:2.) The Eleventh Circuit found on appeal that the case was not moot because it was capable of repetition, yet evading review. (App. at 5a-6a n.5.)

[5] The Eleventh Circuit did *not* rule that the district court's findings of fact were clearly erroneous; therefore, those findings of fact stood on appeal. Nevertheless, the Eleventh Circuit accepted the State's evidence regarding the effect on some voters

(continued on the following page)

> the contention that the State *must offer its own evidence* demonstrating that the ban on exit solicitation is necessary to serve its compelling interest; our country's long history of election regulation, the consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted.

(App. at 16a. (emphasis added).) On the final prong of the strict scrutiny test, the Eleventh Circuit, unlike the district court, found that the Challenged Law was reasonable and did not significantly impinge on constitutionally protected rights. (App. at 16a-17a.) As a result, the Eleventh Circuit reversed the district court. (App. at 18a.)

WHY THE WRIT SHOULD BE GRANTED

This case concerns the State of Florida's effort to ban core political speech in the form of petition circulation, and the question of whether such a ban can be upheld in the absence of historical or record evidence that it is necessary to serve a compelling State interest. More fundamentally, it concerns the interplay between vital First Amendment rights and the State's right to regulate elections. *See, e.g., Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (explaining that the State's interest in regulating elections "does not extinguish the

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of having to "run the gauntlet," but made no mention of the evidence presented by Petitioners. (App. at 15a n.14.)

State's responsibility to observe the limits established by the First Amendment rights of the State's citizens") (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)).

Petition circulation is a form of core political speech in which First Amendment protections undoubtedly are at their "zenith." *Buckley v. Amer. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999); *Meyer v. Grant*, 486 U.S. 414, 421-22, 425 (1988). It has been an important form of direct, grassroots democracy for more than a century, predating women's suffrage, presidential term limits, the federal income tax, and social security. John G. Matsusaka, *For the Many or the Few* 1 (2004).

Despite these facts, the Eleventh Circuit's opinion treats petition circulation as a second-class right. Indeed, the first sentence of the Eleventh Circuit's opinion – "This appeal is about voting" – fails even to acknowledge that any form of political expression other than voting itself is at issue in this case. (*See* App. at 2a.) In reality, this case is about much more than voting; it is about the proper equilibrium between the fundamental right to vote and the fundamental rights of free speech and association involved in petition circulation.

As a result, this case presents the Court with an ideal opportunity to articulate the correct balance between these fundamental constitutional rights. As discussed in greater detail below, in the 17 years since this Court's plurality decision in *Burson v. Freeman*, federal and state courts have struggled to find this balance, often taking incompatible approaches to resolving the tension between the

exercise of free speech rights near polling places and the State's right to regulate elections. "The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting) (citing Supreme Court Rule 10). By granting the writ, the Court can do just that.

The writ also should be granted because the Eleventh Circuit's opinion erroneously establishes a new standard under which "exit polling" is entitled to greater First Amendment protection than other equally important political speech. By granting the writ, the Court can rectify this error.

1. The Writ Should Be Granted so that the Court May Resolve Uncertainty About the Exercise of First Amendment Rights near Polling Places.

Here, Petitioners attempted to seek petition signatures outside of Florida polling places only from exiting voters and only on an issue that was not on the ballot. (App. at 36a.) In other words, Petitioners did not seek to speak to voters before they voted, and did not seek to influence votes or the outcome of the present election. The evidence in support of these facts was uncontradicted.

Moreover, as the record below made clear, polling places are the best locations to seek petition signatures because of the high concentration of

registered, politically active voters.[6] (R 2-2:2-4.) The Challenged Law has effectively cordoned off petition circulators from this crucial location and, in so doing, has diminished the likelihood that petition circulators will gather the requisite number of signatures necessary to place their initiative proposals on state or local ballots. *Cf. Buckley*, 525 U.S. at 210-11 (Thomas, J., concurring) (citing *Meyer*, 486 U.S. at 422-23) (reducing the audience that petition circulators might reach "made it less likely that initiative proposals would garner the signatures necessary to qualify for the ballot").

Despite these facts, the Eleventh Circuit upheld the Challenged Law and improperly extended this Court's plurality holding in *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, a campaign worker brought a facial challenge to Tennessee's ban on solicitation of votes within 100 feet of polling places. 504 U.S. at 193-94. Specifically, the Tennessee statute created a 100-foot "campaign-free zone" that excluded "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position." *Id.* Because of the narrow scope of the Tennessee statute, *Burson* addressed a limited question – whether the statute, "which pro-hibit[ed] the solicitation of votes and the display or distribution of campaign materials within

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[6] To be placed on the ballot, petitions must be "signed by 10 percent of the registered electors as of the last preceding municipal general election." Fla. Stat. § 166.031(1) (2008).

100 feet of the entrance to a polling place, violate[d] the First and Fourteenth Amendments." *Id.* at 193.

Based upon an historical record of election abuses caused by candidates and their campaign workers, and considering only a facial constitutional challenge to the Tennessee statute, the *Burson* plurality held that a state could, consistent with the First Amendment, prohibit the display and distribution of campaign material within 100 feet of a polling place on election day. *Id.* at 211. But the *Burson* plurality left open the question of whether other types of speech could be prohibited near polling places consistent with the Constitution.[7] The *Burson* plurality also left open the possibility of a successful as-applied challenge to the Tennessee statute. *Id.* at 210 n.13.

Because of *Burson*'s narrow focus on speech by candidates and their campaign workers, it has proven difficult for courts to apply consistently in cases involving restrictions on other types of polling place speech.

For example, in petition circulation cases involving both entering and exiting voters, some

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[7] Indeed, the Tennessee statute at issue in *Burson* actually permitted the very same First Amendment speech barred by Florida's Challenged Law – *i.e.*, the circulation of petitions for the placement of an issue on a future ballot. *See* Brief of Respondent at 11, *Burson v. Freeman*, 504 U.S. 191 (1992) (No. 90-1056), 1991 WL 533556. *See also Burson*, 504 U.S. at 223 (Stevens, J., dissenting) (noting that Tennessee's statute did not prohibit "political debate and solicitation concerning issues or candidates not on the day's ballot").

courts have taken a broad view of *Burson*. These cases seem to be based on the unspoken assumption that petition circulators are the First Amendment equivalents of the candidates and campaign workers prohibited from seeking votes near polling places in *Burson*. In *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), for instance, the court engaged in a cursory, one-paragraph analysis of *Burson* and, based upon that analysis, concluded that because *Burson* upheld a ban on the distribution of campaign material seeking votes, it necessarily followed that "a state may require persons *soliciting signatures* to stand 100 feet from the entrances to polling places without running afoul of the constitution." *Id.* at 748 (emphasis added). In *Burson*, the plurality found that the state's prohibition on campaigning within the 100-foot zone was based upon "ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud." *Id.* (plurality). The *United Food* court, by contrast, cited no evidence that *petition circulators* have had any impact on elections.

Likewise, in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), the court upheld Louisiana's ban on petition solicitation and other speech within 600 feet of polling places, based upon evidence that campaigns had hired poll workers to "inundate" voters with campaign material near polling places, and that these efforts had had a negative impact on the election process. *Id.* at 121. Rather than requiring evidence that petition circulators had interfered with elections, the *Schirmer* court accepted the State's argument

that candidates and their workers might pose as non-ballot political speakers in order to reach voters within the 600-foot zone. *Id.* at 123. The *Schirmer* court agreed with the State that it should not have to police the authenticity of purported non-ballot speakers, but instead could simply ban all political speech near polling places. *Id.*[8]

Neither *United Food* nor *Schirmer*, however, examined the important issue raised by this case: whether petition circulation limited to *exiting voters* can be constitutionally prohibited. Moreover, the Eleventh Circuit's opinion is in conflict with a series of decisions about speaking to exiting voters.

After *Burson*, courts that have addressed prohibitions on speech to exiting voters have repeatedly found such prohibitions unconstitutional because there is no historical or record evidence demonstrating a negative impact on elections from post-voting speech. *See, e.g., Amer. Broad. Co. v. Ritchie*, No. 08-5285, 2008 WL 4635377, at *6 (D. Minn. Oct. 15, 2008) (explaining that the State had presented no evidence that questioning voters *after* voting had a detrimental effect on voting); *Amer. Broad. Co. v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 WL 3149365, at *12 (D. Nev. Nov. 1, 2006) (finding a lack of evidence that *exit* polling had deterred, harassed, or disrupted voters); *CBS Broad.*,

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[8] Contrary to the Fifth Circuit, the Louisiana Supreme Court, relying on *Burson*, later found the 600-foot campaign-free zone unconstitutional. *See State v. Schirmer*, 646 So. 2d 890, 901 (La. 1994).

Inc. v. Cobb, 470 F. Supp. 2d 1365, 1370 (S.D. Fla. 2006) (finding it important that "voters are only approached *after* they have voted") (emphasis added); *Amer. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006) ("By definition, exit polling affects only those who have *already voted*.") (emphasis added).

One circuit court of appeals has gone even farther in protecting the media's right to speak near polling places. In *Beacon Journal Publishing Co. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004), the court found that the media must have "reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters as voters exercise their right to vote." The *Beacon Journal* court did not limit its holding to exit polling; the state was required to permit the media to poll voters both before and after they voted.

Two recent decisions from New Jersey exemplify the inconsistent approaches courts have taken to applying *Burson*. On September 30, 2009, the New Jersey Supreme Court held that New Jersey could constitutionally ban exit pollsters from the area outside polling places. *In re: Attorney General's "Directive on Exit Polling: Media and Non-partisan Public Interest Groups," Issued July 18, 2007*, 981 A.2d 64, 80-81 (N.J. 2009). In fact, the court went so far as to hold that the state could prohibit "all expressive activity" near polling places. *Id.* at 82.

After the New Jersey Supreme Court's decision, the media challenged the New Jersey statute in federal court. *See Amer. Broad. Co. v. Wells*, --- F.

Supp. 2d ---, 2009 WL 3417589 at *1 (D.N.J. Oct. 23, 2009). The district court found that there was "no evidence on the record that exit pollsters have been engaged" in any disruptive conduct, and therefore struck down the ban on exit polling as unconstitutional. *Id.* at *4. The lack of evidence supporting the ban was not the only reason for finding the ban on exit polling unconstitutional.

> Even more persuasive is the fact that the exit polling takes place after individuals vote. Voters are not approached entering polling places – and it is conduct affecting voters on their way to the polls that the government may have an interest in protecting.

Id.

Like the divergent views taken by the two New Jersey courts, the Eleventh Circuit's opinion – which failed to take account of the timing of Petitioners' speech – is diametrically opposed to the holding of the District Court for the Southern District of Florida in *CBS Broadcasting, Inc. v. Cobb*. The two cases involved nearly identical statutes and nearly identical facts. The difference between the cases was simply that one involved media exit polling and the other involved exit petitioning. The *Cobb* court weighed the evidence, considered the speech at issue, and found Florida's ban on solicitation of voters unconstitutional as applied to media exit pollsters because it was not necessary or narrowly tailored. 470 F. Supp. 2d at 1371-72. Here, instead of looking at the evidence proffered by the parties, the Eleventh Circuit ignored the evidence submitted by Petitioners (and accepted

by the district court), and instead equated petition circulators with the ballot candidates whose speech could be restricted under *Burson*. (App. at 13a.) The Eleventh Circuit failed to pay heed to the fact that speech directed only toward exiting voters does not implicate the State's interest in preventing voter fraud or intimidation.

In conjunction with the two recent New Jersey decisions, the Eleventh Circuit's opinion both demonstrates the lower courts' confusion in applying *Burson* and raises numerous questions. Does the decision on whether speech can be banned near polling places depend upon the identity of the speaker (*i.e.*, whether the speaker is a member of the media)? Does it depend on the timing of the speech (*i.e.*, whether the speech occurs before or after voting)? Does it matter whether any historical or record evidence demonstrates that a particular type of speech has misled voters or interfered with elections? Despite all relying upon *Burson*, the courts offer conflicting answers to these critical questions.[9]

This case is in many respects a hybrid of the exit polling and petition circulation cases decided since *Burson*. Like the petition circulation cases, this case plainly concerns political speech near polling places; but, like the exit polling cases, this case concerns only post-voting interaction with voters. And, critically, the record evidence in this case is that

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[9] This is due in large measure to the narrow focus of the *Burson* decision. Indeed, as the Eleventh Circuit noted in its opinion, "*Burson* does not bind us here." (App. at 11a.)

petition circulators in Florida have not caused any electoral abuses. (App. at 35a.) As a result, this case presents an ideal opportunity for this Court not only to examine and articulate the proper balance between the State's right to regulate elections and the citizenry's right to engage in grassroots democracy, but also to provide much needed guidance to the lower courts on the meaning of *Burson* with respect to this unsettled area of constitutional jurisprudence.

2. The Writ Should Be Granted Because the Eleventh Circuit's Opinion Erroneously Establishes a Standard Under Which "Exit Polling" Is Entitled to Greater First Amendment Protection than Other Exit Speech.

The Challenged Law prohibits individuals from seeking petition signatures near polling places, but expressly permits "exit polling." *See* Fla. Stat. § 102.031(4)(b) ("The terms 'solicit' or 'solicitation' shall not be construed to prohibit exit polling."). Critically, the Challenged Law neither defines the topics that may be addressed by an exit pollster nor requires that exit polling be conducted by members of the press. (App. at 24a.) Similarly, the Challenged Law does not limit the number of persons who may engage in exit polling at a particular polling place. Thus, under the Challenged Law itself, any number of persons may enter the No Approach Zone and poll exiting voters about any topic.

This means that a person (whether a member of the press, an average citizen, or even a political candidate) can ask an exiting voter his name, his

address, what candidate he just voted for, why he voted that way, his political party, religion, marital status, employment position, and his view on any number of politically and socially contentious subjects, among many other things. The pollster could even ask whether the exiting voter supports an amendment to the Fort Myers City Charter establishing a police oversight panel (the very same question that Petitioners are barred from asking under the Eleventh Circuit's opinion). And the person conducting the poll could ask the interviewee to sign a form attesting to the accuracy of the information just provided. None of this is prohibited by the Challenged Law.

Nor is exit polling by political candidates prohibited, so that candidates and their campaigns may approach exiting voters and engage in so-called push polling, in which the pollster asks a question in a way intended to influence or alter the view (and future vote) of the person questioned.[10] The Eleventh Circuit's opinion is simply wrong, then, in attempting to distinguish exit polling from exit petitioning on the grounds that "exit polling does not include *advocating* for the success of some political proposal or candidate." (App. at 12a n. 11 (emphasis added).)

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[10] *See, e.g., Caperton v. A.T. Massey Coal, Inc.*, 679 S.E.2d 223, 292 n.11 (W. Va. 2008) (Albright, J., dissenting) (a push poll is "a survey wherein limited and selective background information is conveyed to individuals, the purpose or result of which is to 'push' the individual being surveyed to a negative inference or response against a public individual"), *rev'd on other grounds*, 129 S. Ct. 2252 (2009).

Because there is no constitutionally meaningful difference between the exit polling permitted and the exit petitioning prohibited by the Challenged Law, the Eleventh Circuit's opinion is contrary to well-settled law. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); *Carey v. Brown*, 447 U.S. 455, 466 (1980) (rejecting the proposition that labor picketing is more deserving of First Amendment protection than other types of protests).

The opinion also improperly re-defines the compelling state interest endorsed by *Burson*. Although the Eleventh Circuit's opinion identified Florida's interest as the same interest enunciated in *Burson* – "(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process" – it is actually grounded not in these interests but in preventing "commotion – that is, bustle, stir, confusion – around the polling place" (App. at 2a) and keeping voters from having to "run the gauntlet" (App. at 14a). The State's interest in shielding voters from mere interaction with other citizens is not a compelling state interest. *See Anderson v. Spear*, 356 F.3d 651, 661 (6th Cir. 2004) (protecting voters from being spoken to "is a far cry from prevention of corruption and intimidation – the only justification the Supreme Court recognized in *Burson* to meet the requirements of exacting scrutiny").

Indeed,

> [i]f the right to be let alone provides insufficient basis for the states to restrict the display of profanity in the courtroom or Nazis marching down residential streets occupied by objecting holocaust survivors, then the State's interest in assuring that voters are not subjected to any unwanted campaign speech alone cannot be a sufficient basis to regulate that clearly protected speech.

Id. at 661. *See also U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (under the First Amendment, the right of free expression prevails over a law designed to "shield the sensibilities of listeners"); *Fla. Comm.*, 682 F. Supp. at 1542 ("[I]f the quality of the state interest is merely the offense suffered by a voter who approaches the polls only to be approached by a petitioner, this brief exposure to grassroots democratic process, however unpalatable to some individuals, cannot justify a restriction on speech when the offensive activity can be avoided readily by communicating a declination of interest to the petitioner.") (citing *Cohen v. California*, 403 U.S. 15, 21-22 (1971)). The apparent desire of the Eleventh Circuit to keep everyone other than voters from approaching polling places is also contrary to *Burson* itself, which explains that "allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all

the monitors." 504 U.S. at 207.[11] Thus, paradoxically, under the guise of protecting the democratic process, the Challenged Law and the Eleventh Circuit's opinion seek to protect the Florida public from democracy itself.

By granting the writ, this Court can correct the erroneous standard adopted by the Eleventh Circuit, and ensure that arbitrary categories of speech are not favored under the First Amendment based merely on the labels that are attached to them.

CONCLUSION

This case epitomizes the contradictory approaches courts have taken in applying *Burson* to speech by non-candidates near polling places. By granting the writ, this Court can provide guidance to the lower courts on the proper balance between competing constitutional rights at the heart of our democratic system.

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[11] Moreover, the desire to keep people away from polling places is not achieved by the Challenged Law, which bans from the polling area only a limited class of people, such as petition circulators, but permits anyone to be within the No Approach Zone so long as they do not "solicit" voters.

Respectfully submitted,

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APPENDIX

[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 25, 2009
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.08-15115-DD

D. C. Docket No. 08-00635-CV-FTM-29SPC

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees,

versus

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(June 25, 2009)

Before DUBINA, Chief Judge, EDMONDSON and HILL, Circuit Judges.

PER CURIAM:

This appeal is about voting. Florida Statute § 102.031(4) says that no person may solicit voters "within 100 feet of the entrance to any polling place ... or early voting site," and broadly defines "solicit" to include, among other things, "seeking or attempting to seek a signature on any petition[.]" Fla. Stat. §§ 102.031(4)(a)–(b).[1] The Florida statute codifies the Florida legislature's view that the right of Florida's citizens to vote warrants substantial protection from commotion -- that is, bustle, stir, confusion -- around the voting place. Today, we must decide whether the Florida legislature went too far in defending the right

[1] The Florida statute defines "solicit" and "solicitation" to "include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms 'solicit' or 'solicitation' shall not be construed to prohibit exit polling." Fla. Stat. § 102.031(4)(b).

to vote by banning solicitation that targets voters exiting polling places[2] and that also concerns matters unrelated to any issue then on the ballot. We conclude that the Florida legislature did not go beyond its lawful power and, thus, reverse the district court's decision to bar enforcement of the Florida Statute.

Background

Plaintiff Citizens for Police Accountability Political Committee is a political action committee in the State of Florida. Plaintiff Florida State Conference of the NAACP is the parent organization of 60 Florida branches of the national NAACP. Plaintiffs support an amendment to the Fort Myers, Florida, city charter that would create a citizen oversight panel for the city police department. To place the charter amendment on a ballot, though, Plaintiffs must gather signatures from "10 percent of the [city's] registered electors as of the last preceding municipal general election." Fla. Stat. § 166.031(1). Plaintiffs claim that the best way to obtain signatures is to approach voters exiting polling places.

In January 2008, Plaintiff Citizens for Police Accountability Political Committee tried to solicit signatures from voters leaving a polling place in Fort Myers.[3] Although the proposed charter amendment

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[2] When we refer to polling places in this opinion, we also mean early voting sites.

[3] Plaintiff Florida State Conference of the NAACP did not join the petition-circulation effort until April 2008.

related to nothing then on the ballot, election officials, in accordance with the Florida statute, banned the signature-gatherers from soliciting voters within 100 feet of the polling place. Plaintiffs say that many voters were able to park, vote, and leave without interacting with the signature-gatherers.

Then in August 2008, Plaintiffs filed suit and sought injunctive relief under 42 U.S.C. § 1983 against Kurt S. Browning, in his capacity as Secretary of State of the State of Florida, and Sharon L. Harrington, in her capacity as Supervisor of Elections in Lee County, Florida (collectively, the State). Plaintiffs claimed that the Florida statute violated their First Amendment right to engage in political speech at polling places. Plaintiffs asked the district court to declare the Florida statute unconstitutional on its face and as it applied to their exit-solicitation efforts. Plaintiffs also sought to enjoin the State from enforcing the Florida statute against them when they solicited voters leaving polling places on election day later in August. As with the January election, the proposed charter amendment related to nothing on the ballot in the August election.

The district court held oral argument just before the August election. The next day, the district court entered a preliminary injunction enjoining the State from enforcing the Florida statute against Plaintiffs at polling places on election day.[4] The

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[4] The district court refused to issue an injunction on the ground that the Florida statute is facially unconstitutional. The district court, instead, granted the injunction on an "as applied" basis:

(continued ...)

district court concluded that the Florida statute was probably unconstitutional as it applied to Plaintiffs' exit-solicitation efforts because the State had produced little evidence that the exit-solicitation ban was necessary to serve a compelling interest or that it was sufficiently drawn to achieve that end. The State appeals.[5]

(... continued)
the State -- even extremely close to the polls -- could not enforce or threaten to enforce the Florida statute "as to Plaintiffs' peaceful, orderly and non-disruptive (1) solicitation of signatures (2) for their petition to place an amendment of the Fort Myers City Charter on a future ballot (3) from voters at polling places and early voting sites (4) after the voters have voted (5) during the August 26, 2008 election and its early voting period."

[5] In late 2008, the district court concluded that it had no case or controversy before it and, thus, dismissed the case after Plaintiffs alleged that they acquired the requisite number of signatures to place the proposed charter amendment on a ballot. No party has argued, however, that this appeal is moot or that we otherwise lack jurisdiction. We have considered the matter of our jurisdiction independently, and we conclude that this appeal remains worthy of our attention because the election-related issue involving the State and, at least, Plaintiff Florida State Conference of the NAACP -- the issue of the right to engage in peaceful exit solicitation about non-ballot issues near polling places -- is "capable of repetition, yet evading review." *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (preliminary injunction expired but appeal not moot where seasonal nature of bird nesting made it likely that forest service would face another injunction and where duration of injunction was too short to allow for appellate review before injunction expired); *see also Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 127 S. Ct. 2652, 2663 (2007) ("We have recognized that the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving
(continued ...)

Standard of Review

We review a preliminary injunction for an abuse of discretion. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous. *Id.* We review *de novo* questions of law. *United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir. 2009).

Discussion

A preliminary injunction is an "extraordinary and drastic remedy." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (quoting *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)). To secure an injunction, a party must prove four elements: (1) a

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(... continued)
only facial attacks. Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge-down to the last detail-would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges.") (internal quotation marks and citation omitted); *Storer v. Brown*, 94 S. Ct. 1274, 1282 n.8 (1974) (although pertinent election was "long over," appeal concerning election-related statute not moot because "construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held").

substantial likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) the injury outweighs whatever damage an injunction may cause the opposing party; and (4) an injunction is not adverse to the public interest. *Id.*

The State challenges on appeal only the district court's conclusion that Plaintiffs established a substantial likelihood of success on the merits of their claim that the Florida statute is unconstitutional as it applies to exit-solicitation efforts. The State admits that the Florida statute infringes some on Plaintiffs' right to engage in political speech[6] (see *Meyer v. Grant*, 108 S. Ct. 1886, 1892 (1988)) but contends that the restriction is necessary and narrowly tailored to protect the, at least, equally critical right to vote free from intimidation, interference, and fraud.

In *Burson v. Freeman*, 112 S. Ct. 1846 (1992), the Supreme Court addressed the facial constitutionality of a Tennessee statute that proscribed campaign activity within 100 feet of a polling place.[7] *Id.* at 1848. Considering the Tennessee

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[6] Plaintiffs contend that the Florida statute also infringes some on their First Amendment right to engage in political association. But even if true, the additional infringement has no material affect on the analysis otherwise applicable here; so we discuss it no further.

[7] The Tennessee statute banned within 100 feet of a polling place "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question[.]" *Burson*, 112 S. Ct. at 1848. Like the Florida statute, which saves exit polling from its grasp, Fla. Stat. § (continued ...)

statute as a content-based restriction on political speech in a public forum, the statute could survive only if it was "necessary to serve a compelling state interest" and was "narrowly drawn to achieve that end." *Id.* at 1851 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 955 (1983)).

The Supreme Court upheld the Tennessee statute.[8] In doing so, a plurality of the Supreme Court[9] first reviewed whether Tennessee had a compelling interest to support its statute. Tennessee

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(... continued)
102.031(4)(b), the Tennessee statute also did not restrict exit polling. *Burson*, 112 S. Ct. at 1855. We express no view on the constitutionality of a statute that bans exit polling around polling places.

[8] Justice Blackmun authored the plurality opinion, which Chief Justice Rehnquist and Justices White and Kennedy joined. Justice Kennedy also filed a concurring opinion, and Justice Scalia filed an opinion concurring in the judgment. Justice Stevens filed a dissenting opinion, which Justices O'Connor and Souter joined. Justice Thomas did not participate in the decision.

[9] Justice Scalia joined in the judgment, but not in the plurality opinion. Justice Scalia reviewed the Tennessee statute under a less exacting standard than the strict scrutiny applied by the other Justices because he believed that the statute did not restrict speech in a "traditional public forum." *Id.* at 1859–61 (Scalia, J., concurring in judgment). His justification, therefore, seems to be broader than the plurality opinion. So, we look to the plurality opinion for guidance. *Marks v. United States*, 97 S. Ct. 990, 994 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted).

offered two: (1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process. *Id.* at 1851–52. The plurality agreed that those interests were sufficiently compelling to warrant protection. *Id.*

The plurality then turned to whether the Tennessee statute was necessary to serve those compelling interests. In typical cases involving strict-scrutiny review, the Supreme Court would look to the state to offer evidence that the pertinent statute is necessary to promote the compelling interest. *See Eu v. San Francisco County Democratic Cent. Comm.*, 109 S. Ct. 1013, 1021–23 (1989). But in *Burson*, the plurality required Tennessee to produce no evidence of necessity. *Burson*, 112 S. Ct. at 1856. Instead, the plurality relied on the long history of regulation to combat election misconduct, the substantial consensus in favor of a secret ballot secured by a campaign-free zone that emerged from that history, and common sense to conclude "that *some* restricted zone around the voting area" was necessary to secure Tennessee's compelling interests. *Id.* (emphasis in original).

The plurality last examined whether the Tennessee statute was narrowly tailored. To pass this test, a state normally must show that the pertinent statute used the least restrictive means available to serve the compelling interest. *See Boos v. Barry*, 108 S. Ct. 1157, 1168 (1988). The plurality recognized, however, that it faced a unique situation because of the importance of protecting the right to vote and the difficulties in and dangers of requiring Tennessee to demonstrate the effects of its statute on political

stability.[10] *Burson*, 112 S. Ct. at 10 1856–57. So the plurality departed from the customary analysis and applied a modified "burden of proof" under which the Tennessee statute was sufficiently tailored if it was "reasonable" and did not "*significantly impinge* on constitutionally protected rights." *Id.* at 1857 (emphasis in original). The plurality concluded that the minor geographic limitation in the Tennessee statute -- 100 feet -- satisfied this more lenient standard. *Id.* The statute was constitutional.

The parties dispute the extent to which *Burson* affects this case. The State says that the Florida statute is no different than the Tennessee statute in *Burson* and, thus, the Florida statute should survive for the same reasons. Plaintiffs, on the other hand, claim that the facts in *Burson* are materially different

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[10] The plurality explained those difficulties and dangers this way:

> Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.

Burson, 112 S. Ct. at 1856–57 (internal quotation marks and footnote omitted).

because there a campaign worker wanted to solicit *votes* on election day, while here Plaintiffs aim only to seek the supporting signatures of voters -- who had already voted -- about a non-ballot issue.

We accept that *Burson* does not bind us here; the material facts are different in some ways. Nevertheless, we believe that the *Burson* plurality opinion is highly persuasive; and we extend its reasoning to the facts of this case.

1. Compelling Interest

Under the *Burson* plurality's standard, we must first examine whether the State has a compelling interest to support its statute. The State contends that it shares the same compelling interests as Tennessee in *Burson*: (1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process. Plaintiffs take no issue with the presence or legitimacy of those compelling interests in this case. Nor do we.

2. Necessity

Having identified the pertinent compelling interests, we turn to the more difficult question of whether the Florida statute is necessary to serve those interests. The State claims that it need not produce evidence of exit solicitors intimidating voters or interfering with the election process to prove necessity. Instead, the State asserts that it, like Tennessee in *Burson*, may rely on our country's long history of election regulation, the widespread agreement that emerged from that history, and common sense to show that the ban on exit

solicitation within 100 feet of a polling place is necessary to promote its compelling interests.

Plaintiffs criticize this approach. They say that exit solicitation is a peaceful, non-disruptive activity targeting only those voters who have already voted[11] and claim that this "already-voted" feature distinguishes their conduct from the more intimidating, violent, and unsavory behavior talked about in the *Burson* plurality opinion.[12] Plaintiffs, therefore, argue that the State may not rely on the

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[11] Plaintiffs compare exit solicitation to exit polling. Plaintiffs contend that the Florida statute cannot lawfully prohibit one and permit the other because, according to Plaintiffs, the activities are constitutionally indistinguishable. But we disagree: exit polling does not include advocating for the success of some political proposal or candidate. Like other courts before us, we see fundamental differences between the two activities and, therefore, reject the comparison. *See, e.g., Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993) (exit polling cases not applicable to solicitation cases); *Am. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719, 738 (S.D. Ohio 2006) ("[E]xit polling cannot reasonably be construed as a form of electioneering under any definition of that term."). Moreover, the plurality in *Burson* expressly said that the Tennessee statute did not need to prohibit exit polling to survive strict-scrutiny review. *Burson*, 112 S. Ct. at 1855.

[12] Plaintiffs claim that the plurality in *Burson* found no history of electoral abuse by and no history of election-reform efforts directed at exit solicitors. They cite as support the following language in the plurality opinion: "[T]here is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." *Id.* at 1856. But we believe that the plurality is referring in this dictum to "charitable and commercial solicitation" and not, as Plaintiffs suggest, to forms of political canvassing like exit solicitation. So we afford this argument little weight.

historical evidence of election abuse discussed in the *Burson* plurality opinion but must instead offer its own proof that the ban on exit solicitation in the Florida statute is necessary. Echoing the district court, Plaintiffs say that the State has produced no such evidence.

About history, we agree with the State. We simply cannot accept that exit solicitation is so different from the other political conduct highlighted in *Burson* to compel a different result here. As we see it, commotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process -- even deterring potential voters from coming to the polls -- as other kinds of political canvassing or political action around the polls. This observation seems especially true given the reality that polling places are of such a diverse size and shape, including sometimes using the same doors to enter and exit the polling place, that voters waiting to cast their ballot will often be close to and indistinguishable from voters who have already done so.[13] Although Plaintiffs suggest that election officials can police the polls to ensure that exit solicitation remains peaceful and targets only voters who have already voted, we believe this proposal places too great a burden on those officials to

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[13] Plaintiffs even acknowledged in their complaint when they described the method by which they intended to engage in exit solicitation *the difficulty in targeting only those voters who have already voted*: "A petition circulator will stand near the exit to the polling place, in a position to maximize the *likelihood* of interacting with voters who have already cast their ballots . . . ." (emphasis added).

make split-second decisions on who is being solicited, on how they are being solicited, and about what they are being solicited: an invitation to controversy and more disturbances then and there.

But even in Plaintiffs' imagined perfect world when absolutely only those people who have voted are solicited, our belief does not waiver. The State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote. *See Buckley v. Am. Constitutional Law Found., Inc.*, 119 S. Ct. 636, 640 (1999) (acknowledging that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes") (quoting *Storer*, 94 S. Ct. at 1279); *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) ("We recognize that the state has a significant interest in protecting the orderly functioning of the election process. It must ensure its voters that they may exercise their franchise without distraction, interruption, or harassment."). Given the example of history, if exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And we accept it as probable that some -- maybe many -- voters faced with *running the gauntlet* will refrain from

participating in the election process merely to avoid the resulting commotion when leaving the polls.[14]

The *Burson* plurality opinion teaches us that the State need not wait for actual interference or violence or intimidation to erupt near a polling place for the State to act.[15] The State may take precautions to protect and to facilitate voting; and the pertinent history is broad enough to provide the proof of reasonableness for a zone of order around the polls.

It is hard for State election officials to know the precise moment just before solicitation becomes interference in the election process. And if an election is disturbed, it is hard to know what the impact was on the election. The cost of a disturbed election is too high to allow the State only to react to disturbances

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[14] Indeed, although not necessary to our conclusion, the State produced evidence confirming that many Florida voters have complained that their entrance to and exit from the polls is like "running the gauntlet" and have indicated that "they will no longer participate in elections unless their access to the polls is better protected by the law."

[15] In *Burson*, the plurality observed that Tennessee had other statutes that made it a crime "to interfere with an election or to use violence or intimidation to prevent voting." *Burson*, 112 S. Ct. at 1855. But the plurality recognized that Tennessee's power to protect the voting process was broader than just prohibiting actual interference, violence, or intimidation. *Id.* In a similar way, the district court injunction limits the State to prohibiting only conduct that is disorderly, disruptive, or not peaceful; but to ease and to protect voting, the State's legitimate power under the Federal Constitution goes beyond what the injunction would allow the State to do. The State can do more to restrict political canvassing in a small zone around the polls. Thus, the injunction cannot stand.

but not to prevent disturbances. We, therefore, reject the contention that the State must offer its own evidence demonstrating that the ban on exit solicitation is necessary to serve its compelling interests; our country's long history of election regulation, the consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted.[16]

3. Narrowly Tailored

We last explore the breadth of the Florida statute. To prove that the Florida statute is narrowly tailored, the State must show that the Florida Statute is "reasonable and does not *significantly impinge* on constitutionally protected rights."[17] *Burson*, 112 S. Ct. at 1857 (quoting *Munro v. Socialist Workers Party*, 107 S. Ct. 533, 537–38 (1986))

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[16] Many other state legislatures seemingly share the belief that some solicitation-free zone around polling places is necessary to protect voters from confusion and undue influence and to preserve the integrity and dignity of the election process, as other states too have enacted law markedly similar to the Florida statute. *See, e.g.*, Cal. Elec. Code § 18370 (100-foot zone); Colo. Rev. Stat. § 1-13-714 (100-foot zone); Ga. Code Ann. § 21-2-414(b) (150-foot zone); Idaho Code Ann. § 18-2318(1) (100-foot zone); Mass. Gen. Laws ch. 54, § 65 (150-foot zone); Mich. Comp. Laws § 168.744(2) (100-foot zone); Neb. Rev. Stat. § 32-1524(2) (200-foot zone); Utah Code Ann. § 20A-3-501(2)(a) (150-foot zone).

[17] The plurality in *Burson* cautioned that the modified "burden of proof" applies only where the prohibited activity threatens to interfere with the act of voting itself or physically interferes with voters attempting to cast their ballot. *Burson*, 112 S. Ct. at 1856 n.11. We believe that exit solicitation of the kind in this case triggers the application of the *Burson* plurality's standard.

(emphasis added in *Burson*). The Florida statute mirrors in many respects -- including the size of the restricted zone -- the Tennessee statute upheld in *Burson*. And we conclude that the Florida statute is sufficiently tailored to satisfy the pertinent standard.

Conclusion

We accept that the right to engage in political discourse is "the essence of self-government." *Garrison v. Louisiana*, 85 S. Ct. 209, 216 (1964). But voting is about the most important thing there is. And as history has taught us, the right of political discourse is far from absolute: it must at times step aside so other freedoms similarly pivotal to our republic can thrive. The Florida statute, which balances the right to engage in political speech against the right to vote without interference and harassment, represents one of those times.

We stress the short time (a few days a year) and small area (less than a football field) in which the Florida statute suppresses some political speech around the polls; Plaintiffs are free to solicit signatures unencumbered most days a year and to solicit signatures outside the solicitation-free zone all days a year. And by the way, we are not alone in our decision: other courts, in cases involving petitions, have also upheld statutes establishing solicitation-free zones around polling places.[18] We believe that

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[18] For example, in *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), the Sixth Circuit Court of Appeals applied the *Burson* plurality's standard and affirmed the dismissal of a challenge to an Ohio statute that

(continued ...)

the sanctity of the voting process and the abuse it has historically faced must allow the Florida legislature to exercise some foresight, to take precautions, and to prohibit questionable conduct near polling places before that conduct proves its danger; a compromised election is too great a harm to require otherwise.

We, therefore, conclude today that the Florida statute does not violate the First Amendment by banning Plaintiffs from engaging in exit solicitation about a non-ballot issue within 100 feet of polling places in Florida. Accordingly, the district court abused its discretion in granting Plaintiffs a preliminary injunction.

REVERSED.

(... continued)
prohibited solicitation within 100 feet of a polling place. *Id.* at 748. And earlier, in *Schirmer*, the Fifth Circuit Court of Appeals, also relying on the *Burson* plurality's standard, upheld a Louisiana statute that prohibited solicitation about non-ballot issues within 600 feet of a polling place. *Schirmer*, 2 F.3d at 119.

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, and FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

vs. Case No. 2:08-cv-635-FtM-29SPC

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, and SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants.

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OPINION AND ORDER

This matter comes before the Court on

Plaintiffs' Motion for Preliminary Injunction (Doc. #2) filed on August 11, 2008. Plaintiffs seek to enjoin the enforcement of Florida Statute § 102.031 (4) (a)-(b) (2008) on the basis that it is facially unconstitutional and unconstitutional as applied to plaintiffs' petition circulation activities. Defendant Browning's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction (Doc. #11) was filed on August 19, 2008. The Court heard oral arguments on August 21, 2008. For the reasons set forth below, the motion will be granted in part.

I.

Plaintiff Citizens for Police Accountability Political Committee ("CPA") is a political action committee registered with the Florida Secretary of State and the Lee County Supervisor of Elections. (Doc. #1, ¶10.) Plaintiff Florida State Conference of the National Association for the Advancement of Colored People ("Florida NAACP") is the umbrella organization for sixty Florida branches of the national NAACP and coordinates the activities of the NAACP branches throughout Florida, including the activities of the Lee County, Florida, branch. (*Id.* at ¶ 11.) Since August 30, 2007, CPA has been circulating a petition to place an amendment of the City of Fort Myers Charter on the ballot, in order to create a citizen oversight panel for the Fort Myers Police Department (the "Petition"). (*Id.* at ¶¶ 1, 15.) The Florida NAACP joined the Petition circulation effort on April 23, 2008. (*Id.* at ¶ 18.) To be placed on the ballot, petitions must be "signed by ten percent of the registered electors as of the last preceding municipal general election." FLA. STAT. § 166.031 (1) (2007).

Plaintiffs assert that after nearly a year of circulating the Petition at polling places, recreational areas, and churches, as well as canvassing door-to-door, they and others have obtained approximately 1,700 signatures of verified voters out of the required 2,508 signatures. (Doc. #1, ¶¶ 16, 19-22.)

Plaintiffs assert that the best method of obtaining qualified signatures is to seek voters' signatures after they have left a polling place or, early voting site. (*Id.* at ¶ 23.) During the Presidential Preference Primary on January 29, 2008, however, CPA petition circulators working one Lee County precinct were required to stand outside a 100-foot "No Approach Zone" created by the Florida statute now being challenged. (*Id.* at ¶ 16.) Plaintiffs assert that this "No Approach Zone," which in some precincts covers not only the polling place but also portions of the parking area, entry path and public sidewalks, severely impedes their First Amendment right of access to the high concentration of civically active, registered voters found at polling places on election days and at early voting sites. (*Id.* at ¶¶ 17, 24.)

Plaintiffs plan to circulate the Petition at polling places in Lee County on August 26, 2008, and at early voting sites prior to that date, in an attempt to obtain enough signatures to place their proposed amendment on an upcoming ballot. (*Id.* at ¶ 26.) Plaintiffs seek to have a petition circulator stand near the exit of certain polling places, approach voters as they exit, and attempt to obtain their signature on the Petition. (*Id.* at ¶ 27.) Although the subject matter of the Petition does not relate to any matter

on the current ballot, the "No Approach Zone" mandated by the Florida statute would preclude this activity. (*Id.* at ¶ 28.)

Count One of the Complaint seeks a declaratory judgment that the Florida statute is facially unconstitutional as a content-based, substantially overbroad restriction on protected First Amendment speech and conduct. (*Id.* at ¶¶ 39, 40.) Count Two seeks a declaratory judgment that the Florida statute is unconstitutional as applied to plaintiffs' Petition circulation activities as a content-based, impermissible restriction on plaintiffs' First Amendment rights of speech and association, and the right to petition for grievances. (*Id.* at ¶¶ 47, 50, 52.) Count Three seeks preliminary and permanent injunctive relief banning the enforcement of the Florida statute against plaintiffs. (*Id.* at ¶ 58.)

II.

Florida statute § 102.031 addresses, among other things, the maintenance of good order at polling places and the unlawful solicitation of voters. The statute first gives each election board the "full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes." FLA. STAT. § 102.031 (1) (2008). The statute then requires the Sheriff to deputize a deputy sheriff for each polling place and each early voting site, requires the deputy sheriff to be present from the time the polls or early voting sites open until the election is completed, and requires the deputy sheriff to be subject to the lawful commands of the clerk or inspectors and to maintain good order. FLA. STAT. § 102.031 (2). The statute

identifies the persons who may enter the polling room or polling place and early voting areas. FLA. STAT. § 102.031 (3). The statute then provides, in the portion challenged by plaintiffs, as follows:

> (a) No person, political committee, committee of continuous existence, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, or early voting site. Before the opening of the polling place or early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries.
>
> (b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" shall not be construed to prohibit exit polling.

FLA. STAT. § 102.031(4) (a)-(b). The statute does not define "exit polling." The statute further requires that each supervisor of elections inform the clerk of the designated area within which soliciting is deemed to

be unlawful, based on the particular characteristics of that polling place. FLA. STAT. § 102.031 (4) (c). The supervisor or clerk is allowed to "take any reasonable action necessary to ensure order at the polling places," including having disruptive or unruly persons removed by law enforcement from the polling room, polling place, or from the 100-foot zone surrounding the polling place. *Id.*

The Florida Department of State is required to create and adopt a uniform polling place procedures manual discussing, among other things, regulations governing solicitation by individuals and groups at polling places. FLA. STAT. § 102.014 (5) (a) (2008). Florida Administrative Code Rule 1S-2.034 adopted the "Polling Place Procedures Manual" (the "Manual") by the Florida Department of State, Division of Elections, the current version of which is effective August, 2008. In pertinent part, the Manual states that "[t]he ***only exception*** to the no-solicitation law applies to the media or others who are allowed to conduct exit-polling activities. They may approach voters only *after* voters leave the polling place." *See* Div. of Elections, Fla. Dep't of State, *Polling Place Procedures Manual*, at 4 (2008) (emphasis in original), http://election.dos.state.fl.us/publications/pdf/2007-2008/2008VoterRegisVoteGuide.pdf.

III.

In the Eleventh Circuit, the issuance of "a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion" on each of four prerequisites. *Canal Auth. of Fla. v.*

Callaway, 489 F.2d 567, 573 (5th Cir. 1974)[1]. *See also McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). The party seeking a preliminary injunction must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered absent an injunction; (3) that the injury to movant outweighs the injury the proposed injunction would cause to the opposing party; and (4) that the proposed injunction would serve the public interest. *E.g.*, *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1325 (11th Cir. 2008). The burden of persuasion for each of the four requirements is upon the movant. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

IV.

Plaintiffs argue that FLA. STAT. § 102.031 (4) (a)-(b) is unconstitutional both on its face and as applied to plaintiffs' exit petitioning. The current statute was amended effective July 1, 2008, and no reported case has yet addressed its constitutionality. Plaintiffs argue that the recent amendments to the statute harken back to former versions of the statute which were found unconstitutional. (Doc. #2, pp. 2-7.) Defendants respond that *Burson v. Freeman*, 504 U.S. 191 (1992), compels the conclusion that the Florida statute is constitutional and that plaintiffs have not satisfied any of the four requirements for a

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[1] In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

preliminary-injunction. (Doc. #11.)

Some preliminary matters are not disputed by either party. First, there is no doubt that soliciting signatures for a petition to amend a city charter is a matter protected by the First Amendment. Such conduct has been appropriately described as "core political speech" in which the importance of First Amendment protection is "at its zenith." *Meyer v. Grant*, 486 U.S. 414, 414, 420-22, 425. (1988); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999). Additionally, gathering at the polls to solicit signatures is protected political association. *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1511 (11th Cir. 1985).

Second, there is also no doubt that the State of Florida and Lee County have compelling interests in regulating election and voting matters. Each has compelling interests in protecting the right of their citizens to vote freely for candidates of their choice in an election conducted with integrity and reliability, and in protecting against voter intimidation, confusion, and election fraud. *Burson*, 504 U.S. at 198-99. Thus, the U.S. Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 187 (citations omitted.) *See also Clean-Up '84*, 759 F.2d at 1514 ("We recognize that the state has a significant interest in protecting the orderly functioning of the election process. It must ensure its voters that they may exercise their franchise without distraction, interruption, or harassment.") Additionally, the

Florida Voter's Bill of Rights includes the right to "[v]ote free from coercion or intimidation by elections officers or any other person." FLA. STAT. § 101.031 (2) (2006).

Third, since at least 1977, Florida has attempted to specifically prohibit solicitations of signatures for petitions near polling places. FLA. STAT. § 104.36 (1977). Florida's statutory history, in addressing the concerns related to solicitation at a polling place, has been summarized in Florida Committee for Liability Reform v. McMillan, 682 F. Supp. 1536, 1538-39 (M.D. Fla. 1988) and CBS, Inc. v. Smith, 681 F. Supp. 794, 797-98 (S.D. Fla. 1988). Each version of the statute that has been challenged has been found to be unconstitutional or has been enjoined as likely to be unconstitutional. Clean-Up '84, 759 F.2d at 1513 (invalidating 1984 version as overbroad on its face); Florida Committee, 682 F. Supp. 1536, 1538-39 (M.D. Fla. 1988) (enjoining enforcement of 1987 version as overbroad); CBS, Inc., 681 F. Supp. at 794 (enjoining enforcement of 1987 version as applied to media exit polling); Firestone v. News-Press Pub. Co., 538 So. 2d 457, (Fla. 1989) (invalidating statute, precluding nonvoters from being within fifty feet of the polling place, as overbroad); CBS Broad., Inc. v. Cobb, 470 F. Supp. 2d 1365 (S.D. Fla. 2006) (enjoining enforcement of 2005 version as overbroad as applied to exit polling). Despite this history, defendants assert that "*Burson* reconstructed the way courts approach constitutional challenges to polling place restrictions." (Doc. #11, p. 4.)

V.

The most hotly-contested issue is plaintiffs' substantial likelihood of success on the merits. Plaintiffs assert that they are likely to prevail on both their facial and as-applied challenges, while defendants assert that plaintiffs will not prevail on either.

A. Facial Challenge to Statute:

In Count One of their Complaint, plaintiffs argue that Florida Statute § 102.031 (4) (a)-(b) (2008) violates the First Amendment on its face. A facial challenge seeks to invalidate the statute itself, and seeks to vindicate not only plaintiffs' rights but those of others who may be adversely impacted by the statute. *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). The U.S. Supreme Court has articulated two standards for evaluating such facial First Amendment challenges. *Clean-Up '84*, 759 F.2d at 1513.

(1) Unconstitutional in All Applications:

Under the first test, "a plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 128. S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739 (1987)). "[A] facial challenge must fail where the statute has a plainly legitimate sweep." *Wash. State Grange*, 128 S. Ct. at 1190, quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40. (1997). The Supreme Court also cautioned that "[i]n determining

whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 128 S. Ct. at 1190 (citation omitted.) In short, "[f]acial challenges are disfavored ..." *Id.* at 1191.

Plaintiffs do not seem to pursue an argument under this standard. (Doc. #2, pp. 18-21.) It is clear in light of *Burson* and *Wash. State Grange* (discussed below) that Florida Statute § 102.031 (4) (a)-(b) (2008) is not categorically unconstitutional in each of its potential applications. Therefore, plaintiffs do not satisfy this standard.

(2) Overbreadth of statute:

The second type of facial challenge in the First Amendment context concerns an impermissibly overbroad statute. *Wash. State Grange*, 128 S. Ct. at 1191 n.6. "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). Because this doctrine balances competing interests, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *Williams*, 128 S. Ct. at 1838 (citations omitted.) "'The concept of 'substantial overbreadth' is not readily reduced to an exact definition. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections

of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-801 (1984).

The Court finds that plaintiffs have not shown a substantial likelihood that they can establish that Florida Statute § 102.031(4) (a)-(b) (2008) prohibits a substantial amount of protected speech either in an absolute sense or relative to the statute's plainly legitimate sweep. While plaintiffs show that a literal application of the 100-foot zone encompasses traditional public forums at some polling places, the showing has not been sufficient either in the absolute sense or relative to the statute's plainly legitimate scope. The statute requires that the supervisor of elections inform the clerk of the designated no-solicitation area "based on the particular characteristics of that polling place," FLA. STAT. § 102.031 (4) (c), and requires the clerk or supervisor to designate the no-solicitation zone and mark its boundaries before the polling place or early voting site is opened. FLA. STAT. § 102.031 (4) (a). Plaintiffs allege that one polling place, Precinct 48, had a No Approach Zone that actually encompassed traditional public forums (Doc. #1, ¶¶ 16-17) and that this appeared to be the situation at two other polling places as well. (Declaration of Aisha Sanchez, Doc. 2-3, ¶¶ 14-15.) This does not constitute a sufficient showing that the actually designated no-solicitation zones have included traditional public forums to a substantial degree.

B. As Applied Challenge:

An as-applied challenge is available even

where a facial challenge is rejected. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2670 n.8 (2007); *City Council*, 466 U.S. at 803 n.22 ("The fact that the ordinance is capable of valid applications does not necessarily mean that it is valid as applied to these litigants.") An "as-applied" challenge seeks to vindicate only plaintiffs' own rights. *DA Mortg., Inc.*, 486 F.3d at 1262; *Jacobs v. The Florida Bar*, 50 F.3d 901, 906 (11th Cir. 1995).

The general substantive principles relating to election restrictions were summarized in *Wash. State Grange*: the States possess a broad power to prescribe the time, place and manner of holding elections for federal and state offices; this power is not absolute, and may not be exercised in a way that violates specific provisions of the U.S. Constitution, including the First Amendment; the States have the responsibility to observe the First Amendment rights of their citizens, including the freedom of political association; election regulations that impose a severe burden on associational rights are subject to strict scrutiny and are upheld only if they are narrowly tailored to serve a compelling state interest; however, if a State imposes only modest burdens, then a state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures. *Wash. State Grange*, 128 S. Ct. at 1191-92 (quotations and citations omitted).

As relevant to this case, FLA. STAT. § 102.031(4) (a)-(b) provides that "[n]o person may solicit voters . . . within 100 feet of the entrance to any polling place . . . or early voting site.... "'[S]olicit'

or 'solicitation' shall include, but not be limited to, ... seeking or attempting to seek a signature on any petition; 'solicit' or 'solicitation' shall not be construed to prohibit exit polling." Defendants conceded at oral argument that the statute is content-based, and therefore that strict or exacting scrutiny applies. The strict scrutiny standard defendants advocate is that set forth in *Burson*.

At issue in *Burson* was a Tennessee statute prohibiting the solicitation of votes for or against any person, political party or position, and prohibiting displays or distributions of campaign materials within 100 feet of the entrance to a polling place. *Burson*, 504 U.S. at 193-4. A plurality of the Supreme Court found that "[a]s a facially content-based restriction on political speech in a public forum [the Tennessee statute] must be subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" *Id.* at 198 (quotations omitted). The Supreme Court noted that to survive strict scrutiny, a State must do more than assert a compelling state interest – it must demonstrate that its law is necessary to serve the asserted interest." *Id.* at 199. The Court "readily acknowledged" that a law rarely survives the exacting standards of strict scrutiny analysis, but found that "an examination of the evolution of election reform . . . demonstrates the necessity of restricted areas in or around polling places." *Id.* at 200. The Court found that a history of pervasive and systematic abuses of the electoral system led all fifty states to settle on the same solution: "a secret ballot

secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

In reaching this conclusion, the Court rejected three arguments. First, the Court rejected the argument that the statute was overinclusive because the state could secure the same compelling interests with statutes making it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. *Id.* (quotations omitted). Second, the Court rejected the argument that the statute was underinclusive because it does not restrict other types of speech, including exit polling. *Id.* at 207 (quotations omitted). The Court stated: "We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny. We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive." *Id.* The Court found that while there was ample historical evidence that political candidates had used campaign workers to commit voter intimidation and electoral fraud, there was no historical evidence that other forms of solicitation or exit polling had been used to commit such electoral abuses. "States adopt laws to address the problems that confront them. The First Amendment does not require states to regulate for problems that do not exist." *Id.* Third, the Court rejected the argument that there was no link between ballot secrecy and some restricted zone surround the voting area. *Id.* at 207-08. The Court held that "*some*

restricted zone around the voting area is necessary to secure the state's compelling interest." *Id.* at 208. (emphasis in original).

The Court then discussed the "real question" of "*how large* a restricted zone is permissible or sufficiently tailored." *Id.* (emphasis in original). The Court concluded that an empirical demonstration of the objective effects of the statute on voting was unnecessary ("Elections vary from year to year, and place to place"), and that proof that the 100-foot boundary was perfectly tailored to deal with the State's interests was not necessary so long as the statute was reasonable and did not significantly impinge on constitutionally protected rights. *Id.* at 209.[2] The Court concluded that it did "not think that the minor geographic limitation prescribed by [the statute] constitute [d] such a significant impingement. Thus, [it] simply d[id] not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" *Id.* at 210. "The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice." *Id.*

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[2] The Court noted that this "modified 'burden of proof'" applied "only when the First Amendment right threatens to interfere with the act of voting itself, *i.e.*, cases involving voter confusion from overcrowded ballots, like *Munroe [v. Socialist Workers Party*, 479 U.S. 189 (1986)], or cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots." *Burson*, 504 U.S. at 209 n. 11.

Thus, under *Burson*, the state must show that the statute is (1) necessary (2) to serve a compelling state interest and (3) that it is narrowly drawn or sufficiently tailored to achieve that end. As discussed previously, there is no dispute that Florida Statute § 102.031 (4) (a)-(b) (2008) serves compelling state interests. The difficulty in this case involves whether the restricted area is "necessary" and narrowly drawn in relation to plaintiffs' specific activities. In the as-applied context of this case, the Court finds that the statutory restriction is neither necessary nor narrowly drawn as applied to plaintiffs' exit petitioning activity.

Burson's determination that a restricted area around polling places could be necessary was based upon an extensive review of historical experience with political candidates, and their abuse and attempted abuse of the electoral process. The Tennessee statute at issue related directly to such abuse, prohibiting the solicitation of "votes" (not "voters" as in the Florida statute) and the display and distribution of campaign materials. The ample historical evidence clearly established the necessity for such a restricted zone as to such conduct. In contrast, *Burson* found no historical evidence that solicitations by others or exit polling had been used to commit comparable electoral abuses. 504 U.S. at 206. The evidence submitted by the parties in this case also fails to establish electoral abuses perpetrated by other exit solicitors or exit polling. Therefore, at this stage of the proceedings, there has not been a sufficient showing that the restriction on exit petitioning is necessary.

In this case, the narrowly-drawn component of strict scrutiny review relates not to the 100-foot distance but to the types of activities precluded within that zone. Exit polling, left undefined in the Florida statute, is permitted, while other exit solicitation, including the solicitation of signatures on petitions, are prohibited. Even assuming that an exit solicitation qualifies for the "modified burden of proof" requirement of *Burson* because it is considered an "activity [which] physically interferes with electors attempting to cast their ballots," *Burson*, 504 U.S. 209 n. 11, the statute must still be reasonable and must not significantly impinge on constitutionally protected rights. The record at this stage of the proceedings does not satisfy these requirements as they relate to plaintiffs' proposed activities. Plaintiffs propose to, in a peaceful, orderly and non-disruptive manner, (1) solicit signatures (2) for a petition required by statute to place an amendment of the Fort Myers City Charter on a future ballot (3) from voters at polling places and early voting sites (4) after the voters have voted (5) during the August 26, 2008 election and its early voting period, during which the subject matter of the petition is not related to any matter upon which the voters are deciding. Under these specific circumstances, the ban on soliciting signatures is not narrowly drawn or sufficiently tailored to satisfy the First Amendment.

VI.

The remaining three requirements for a preliminary injunction require relatively less discussion, and each will be briefly addressed in turn.

A. Substantial Threat of Irreparable Injury if Relief Denied:

Defendants assert that plaintiffs' purported injury can be simply quantified in terms of the additional money, time and effort to be expended by plaintiffs while pursuing the remaining signatures for the Petition. (Doc. #11, pp. 18-19.) Defendants claim that plaintiffs "could eliminate any purported harm by expending the additional increment of time and effort to collect sufficient signatures outside of the protected zone, just as numerous other sponsors of successful Florida initiative petitions (both local and statewide) have done."[3]

Plaintiffs assert that irreparable harm will result in the absence of an injunction; namely, that no amount of monetary damages would suffice to compensate plaintiffs for "the lost opportunity to circulate the [P]etition at Lee County polling places on the day of an election and at early voting sites," (Doc. #2, p. 22), and that "because of the 'intangible nature' of the harm the chilling of speech inflicts, it cannot be compensated for by money damages." (*Id.* (citing *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261,

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[3] Defendants claim that *Elrod* is inapplicable because Florida's "No Approach Zone" "does not prevent speech altogether – it is a 'minor geographic limitation' that constitutes no 'significant impingement' of First Amendment rights." (Doc. #11, p. 19 n.15 (quoting *Burson*, 504 U.S. at 210).) The language that defendants reference, however, refers to the Supreme Court's discussion of the radius of the *Burson* statute's protected zone (whether a 100-foot zone is narrowly tailored), rather than the Supreme Court's substantive discussion as to the protected zone's constitutionality overall.

1272 (11th Cir. 2006).)

The Court finds that plaintiffs have shown that they will suffer irreparable injury if a preliminary injunction is denied because the loss of First Amendment rights, even for a short period, causes irreparable harm. "[I]t is well established [by the Supreme Court] that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *E.g.*, *KH Outdoor*, 458 F.3d at 1271-2 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). "To the extent that an infringement of First Amendment rights is shown, some federal courts have held that irreparable injury justifying preliminary injunctive relief is presumed." *Cate*, 707 F.2d at 1189 n. 10 (citation omitted). "One reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Id.* at 1189 (citation omitted). Restricting plaintiffs' access to seek petition signatures will work an irreparable harm on plaintiffs' exercise of their rights to petition the government for redress of grievances.

B. Balancing Injury to Parties:

Plaintiffs assert that they would suffer significantly greater harms under the statute's restrictions than defendants would suffer should the injunction be granted. Plaintiffs claim that polling places provide the highest concentration of registered

voters, who are precisely the signatories required under Florida statute in order to place the Petition on the ballot. (Doc. #2, p. 22.) Plaintiffs further argue that "door-to-door canvassing and shoppingmall [sic] solicitation are poor and impractical alternatives for purposes of collecting large numbers of signatures for registered voters," and that the farther plaintiffs get from the polling place exit, the less likely they are to interact with a voter. (*Id.* (citing *Committee for Sandy Springs, Inc. v. Cleland*, 708 F. Supp. 1289, 1291 (N.D. Ga. 1988); *CBS, Inc.*, 681 F. Supp. 794, 799-800 (S .D. Fla. 1988)).

Defendants claim that plaintiffs' injury is "hardly substantial" and that on balance, the imposition of a preliminary injunction would "not be a measured response to [p]laintiffs' claims that their signature gathering would be more efficient closer to the polling place door." (Doc. #11, p. 19.) As discussed above, it is not clear from the record in this case that the issuance of a preliminary injunction will substantially harm defendants, or that denial of plaintiffs' requested relief is necessary to protect defendants' legitimate interests. Furthermore, as plaintiffs indicate, "a number of readily available means, short of an outright ban on solicitation, can be employed to protect the integrity of the election process." (Doc. #2, p. 24 (quoting *Florida Committee*, 682 F. Supp. at 1543).) Thus, the Court finds that plaintiffs have shown that they will suffer relatively more harm from the denial of a preliminary injunction than defendants would suffer should relief be granted.

C. Public Interest:

Defendants assert, legitimately, that Florida has an interest in "protecting voters from harassment and intimidation at their polling places . . . [and in] protect[ing] the orderly administration of elections and the election process." (Doc. #11, p. 20.) Defendants further argue that the issuance of a preliminary injunction runs counter to this public interest. Defendants claim that "Florida's interest in maintaining a limited protected zone around polling places is substantial," and that plaintiffs' "purported needs cannot justify the invalidation of Florida's critical protected zone around polling places." (Doc. #11, p. 20.) Plaintiffs disagree, stating that "[b]ecause freedom of speech is a cherished right in American society, those activities that promote the exercise of this fundamental right are clearly in the public interest." (Doc. #2, p. 24.)

The Court finds that the public interest would be furthered by granting a preliminary injunction to enjoin enforcement of the statute and to allow plaintiffs' requested form of exit petition circulation, without unduly burdening the State's interest in preventing voter intimidation or erosion of integrity in the electoral process. As in *Florida Committee*, impeding plaintiffs from asking their fellow citizens to join them in proposing an amendment defeats the public interest in robust debate on public issues. 682 F. Supp. at 1543. *See also*, *Clean-Up '84*, 582 F. Supp. at 127 ("All citizens have an interest in a robust debate on public issues."). Further, the Court agrees with plaintiffs' argument that "not only will a preliminary injunction serve [p]laintiffs' interest in

exercising their rights, it will also serve the interests of the citizens and registered voters of the City of Fort Myers in receiving communications of the sort proffered by [plaintiffs]. (Doc. #2, p. 25 (citing *University Books & Videos, Inc. v. Metropolitan Dade County*, 33 F. Supp. 2d 1364, 1374 n.11 (S.D. Fla. 1999).)

Accordingly, it is now

ORDERED:

Plaintiffs' Motion for Preliminary Injunction (Doc. #2) is **GRANTED** in part. A preliminary injunction will issue separately.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of August, 2008.

/s John E. Steele

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies: Counsel of record

Filed
2008 AUG 22 AM 11:15
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, and FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

vs. Case No. 2:08-cv-635-FtM-29SPC

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, and SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants.

----------/

PRELIMINARY INJUNCTION

This matter came before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. #2) filed on August 11, 2008. Plaintiffs sought to enjoin enforcement of Florida Statute § 102.031(4) (a)-(b) (2008) on the basis that it is facially unconstitutional and unconstitutional as applied to plaintiffs' petition

circulation activities. The Court heard oral arguments on August 21, 2008, and has entered an Opinion and Order contemporaneously with this Preliminary Injunction setting forth its findings. The Court finds, as more fully set forth in that Opinion and Order, which is incorporated herein, the following:

1. Plaintiffs have established that they are substantially likely to succeed on the merits of their First Amendment claim as it relates to the as-applied challenge to Florida Statute § 102.031(4) (a)-(b) (2008);

2. Plaintiffs have established that there is a substantial threat of irreparable injury absent the granting of a preliminary injunction prohibiting enforcement of Florida Statute § 102.031(4) (a)-(b) (2008), as to plaintiff's exit petition activities at polling places and early voting sites during the August 26, 2008 election and its early voting period;

3. Plaintiffs have established that their injury resulting from enforcement of Florida Statute § 102.031 (4) (a) - (b) (2008), as to plaintiff's exit petition activities at polling places and early voting sites, outweighs the potential injury to defendants if the preliminary injunction is granted; and

4. Plaintiffs have established that an injunction barring enforcement of Florida Statute § 102.031(4) (a)-(b) (2008) would not harm or do a disservice to the public interest.

Accordingly, it is now

ORDERED:

1. Defendants Kurt S. Browning, in his capacity as Secretary of State of the State of Florida, and Sharon L. Harrington, in her official capacity as Supervisor of Elections, Lee County, Florida, and their officers, agents, servants, employees, and attorneys, whether acting alone or in concert with others, are prohibited and enjoined from enforcing or threatening to enforce Florida Statute § 102.031(4)(a)-(b) (2008) as to Plaintiffs' peaceful, orderly and non-disruptive (1) solicitation of signatures (2) for their petition to place an amendment of the Fort Myers City Charter on a future ballot (3) from voters at polling places and early voting sites (4) after the voters have voted (5) during the August 26, 2008 election and its early voting period.

2. This preliminary injunction shall not in any way restrain those persons, whose duty it is to police the polling places and early voting sites, from the performance of their duty to protect voters or prospective voters from interference with the free exercise of their right to vote; and

3. The Court finds that no surety bond need be posted by plaintiffs.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of August, 2008.

/s John E. Steele

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies: Counsel of record

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 04 2009
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.08-15115-DD

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees,

versus

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida, SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: DUBINA, Chief Judge, EDMONDSON and HILL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s J.L. Edmonson

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

(3)

No. 09-861

Supreme Court, U.S.
FILED
MAR 19 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, and FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioners,

v.

KURT S. BROWNING, in his official capacity as Secretary of State of the State of Florida, and SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County, Florida,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with *Burson v. Freeman*, 504 U.S. 191 (1992), Florida may restrict Election-Day petition gathering inside the limited geographic area 100 feet from a polling-place entrance.

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STATEMENT OF THE CASE AND FACTS

Florida, like other states, restricts petition gathering and other political activity near polling places. *See* Fla. Stat. § 102.031(4) (2009). Petitioners challenged the restriction, claiming it violated their First Amendment rights. The Eleventh Circuit upheld the law, recognizing Florida's compelling state interests and stressing "the short time (a few days a year) and small area (less than a football field) in which the Florida statute suppresses some political speech around the polls." (Pet. App. at 17a-18a.)[1] Petitioners seek certiorari review.

Petitioners are political organizations that hoped to amend the Fort Myers City Charter through a citizen initiative process. (R.1:¶¶ 1, 10, 11.) They required 2,508 petition signatures but were lacking approximately 800 as of August 2008, when this case began. (*Id.* ¶¶ 20-22.) Wanting to solicit the remaining signatures within 100 feet of polling-place entrances during the August 26, 2008 primary election (and subsequent elections), Petitioners sued Kurt S. Browning, in his official capacity as the Secretary of State of the State of Florida, and Sharon L. Harrington, in her official capacity as the Supervisor of Elections for Lee County, Florida (together, "Respondents"). (*Id.* ¶¶ 1, 2, 12, 13.)

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[1] References to the petition for writ of certiorari will be "(Pet. at [pg])." References to its appendix will be "(Pet. App. at [pg])." References to the district court record will be "(R.[docket number]:[page or paragraph])."

The case began with Petitioners' Verified Complaint and Motion for Preliminary Injunction, filed fifteen days before the August 26, 2008 primary election. (R.1:¶ 14; R.2.) Both sides filed witness declarations, and the district court heard argument, but there was no evidentiary hearing or live testimony. (R.2, Exh. A-B; R.9, 11, 15); *see also* M.D. Fla. R. 4.06(b) ("All hearings scheduled on applications for a preliminary injunction will be limited in the usual course to argument of counsel unless the Court grants express leave to the contrary . . . ."). Provided only a limited preliminary injunction record, the district court made few factual findings. But it concluded that, "at this stage of the proceedings, there has not been a sufficient showing that the restriction on exit petitioning is necessary." (Pet. App. at 35a; *accord id.* at 36a ("The record at this stage of the proceedings does not satisfy these requirements as they relate to plaintiffs' proposed activities.")). The day after the hearing—the Friday before the Tuesday election—the district court granted a preliminary injunction. (R.17, 18.) Respondents promptly appealed. (R.21.)

The district court never resolved the case on its merits; it ruled only on the preliminary injunction motion. With the interlocutory appeal pending, Petitioners obtained the requisite number of signatures. (Pet. at 13 n.4.) They then declared that the "case is now moot because Plaintiffs seek no further relief from this Court other than the awarding of expenses

and attorney's fees." (R.35:3.) The district court agreed and dismissed the case as moot. (R.39.)[2]

Notwithstanding the district court's dismissal, the Eleventh Circuit maintained jurisdiction over the then-pending interlocutory appeal because the issue was "capable of repetition, yet evading review." (Pet. App. at 5a n.5.) In June 2009, the Eleventh Circuit reversed the preliminary injunction order and upheld the statute. (*Id.* at 17a-18a.) The court concluded that "the sanctity of the voting process and the abuse it has historically faced must allow the Florida legislature to exercise some foresight, to take precautions, and to prohibit questionable conduct near polling places." (*Id.* at 18a.)

The Eleventh Circuit denied Petitioners' request for rehearing and took no further action. (Pet. App. at 45a-46a.) And because the district court had already dismissed the underlying case as moot, there was no

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[2] Seeking a final decision on the merits, and with the interlocutory appeal pending, Respondents separately appealed the district court's final order of dismissal. (R.42.) The Eleventh Circuit dismissed that appeal for lack of standing, concluding the district court's dismissal was not adverse to Respondents. (R.45.) Petitioners supported the Eleventh Circuit's dismissal, asserting that although they were the prevailing parties "on the substantive issues" and thus entitled to fees, Respondents were the prevailing parties "[i]n a technical sense" because of the dismissal for mootness. Appellees' Response to Jurisdictional Question, *Citizens for Police Accountability Political Comm. v. Browning*, Case No. 09-10002-D, at 5 & n.4 (11th Cir.), filed Feb. 2, 2009.

further activity below.[3] Petitioners now seek a writ of certiorari.

ARGUMENT

Petitioners complain of uncertainty surrounding a State's constitutional authority to restrict polling-place political activity. (Pet. at 16.) They also insist the decision below established a new legal standard, which affords certain types of speech more protection than others. (Pet. at 24.) But this area of the law is well established, and the legal issues below were neither novel nor complex. Courts evaluating similar challenges have applied this Court's precedent uniformly, consistently, and correctly. There is no uncertainty, no confusion, and no need for further review.

Moreover, even if this Court were inclined to revisit this area of the law, this case is not the appropriate vehicle. The district court based its decision on a limited preliminary injunction record, and because it subsequently dismissed the case as moot, there has been (and will be) no further activity below. This Court's review would be hampered by the absence of a properly developed record.

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[3] Petitioners' proposed amendment appeared on the November 3, 2009 ballot, not long after the Eleventh Circuit's mandate issued. The Fort Myers electors defeated the proposal 2,434 to 990 (71% to 29%). *See* Official Municipal Election Results, Nov. 3, 2009, available at www.leeelections.com/download/elhis09/091103/result2.html, last visited March 18, 2010.

A. There is No Uncertainty or Confusion Regarding Whether States Can Restrict Petition Gathering Within 100 Feet of Polling-Place Entrances.

Like many before it, this case involved a balancing of First Amendment freedoms. The First Amendment protects Petitioners' political solicitation, *Meyer v. Grant*, 486 U.S. 414, 425 (1988), but every citizen enjoys a fundamental right to vote. Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Courts routinely weigh competing constitutional interests, and they have consistently settled the balance of rights at issue here.

The challenged Florida statute broadly prohibits political solicitation and other activities within 100 feet of a polling-place entrance on Election Day.[4] *See* Fla. Stat. § 102.031(4) (2009). Nearly two decades ago, this Court upheld a Tennessee statute that likewise broadly prohibited political solicitation within 100 feet of a polling-place entrance on Election Day. *Burson v. Freeman*, 504 U.S. 191, 193 (1992) (plurality opinion). Numerous federal courts—including the

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[4] In addition to Election-Day voting, Florida offers early voting, which begins fifteen days earlier. Fla. Stat. § 101.657 (2009). The 100-foot restriction applies equally during the early voting period. *Id.* § 102.031(4).

Eleventh Circuit below—have applied *Burson* consistently and without difficulty. There is no uncertainty or confusion permeating this area of the law, and there is no need for this Court to revisit *Burson*.

The statute in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." *Id.* at 193-94. Wishing "to communicate with voters" notwithstanding the statute, plaintiff brought a facial challenge. *Id.* at 194. The Tennessee Supreme Court invalidated the statute, but this Court reversed. *Id.* at 211.

Concluding the statute was a content-based restriction on speech, the plurality applied strict scrutiny.[5] *Id.* at 198. It recognized a State's "compelling interest in preserving the integrity of its election process." *Id.* at 199 (quoting *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989)). And it recognized an additional compelling interest in "protecting voters from confusion and undue influence." *Id.* These substantial interests were sufficient to sustain the statute. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting) ("So significant have we found the interest in

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[5] Only eight Justices participated in the *Burson* decision. Four joined the plurality opinion, with Justice Scalia concurring in the judgment. Justice Scalia agreed the statute was constitutional but would have applied a less exacting review than strict scrutiny. *Burson*, 504 U.S. at 216 (Scalia, J., concurring).

protecting the electoral process to be that we have approved the prohibition of political speech *entirely* in areas that would impede that process.") (citing *Burson*).

Applying a modified burden of proof, the plurality examined this country's (and the world's) long history of harms produced by political activity at polling places. History "reveals a persistent battle against two evils: voter intimidation and election fraud." *Burson*, 504 U.S. at 206. This history justified the statute; the Court required no additional evidence. "[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in *Burson*); *accord Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1619 (2008) (upholding constitutionality of photo identification requirement based on nation's history of fraud, notwithstanding fact that "[t]he record contain[ed] no evidence of [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history").

The *Burson* plurality concluded that a "long history" and "simple common sense" demonstrate "that some restricted zone around polling places is necessary to protect [the] fundamental right [to vote]." 504 U.S. at 211. Accordingly, "requiring solicitors to stand

100 feet from the entrances to polling places does not constitute an unconstitutional compromise." *Id.* *Burson* left no confusion, and neither courts nor legislatures have struggled to follow it.

The statute in *Burson* was not unique. As the plurality observed, "all 50 States limit access to the areas in or around polling places." *Id.* at 206; *see also id.* at 211 (observing "substantial consensus" regarding restricted zones). That remains true today. *See* Appendix. Twenty-one states restrict political speech within a 100-foot radius[6]—the "minor geographic limitation" approved in *Burson,* 504 U.S. at 210. Seventeen restrict larger areas.[7] Still others restrict

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[6] *See* Ark. Code Ann. § 7-1-103(a)(9)(A); Ca. Elec. Code § 18370; Colo. Rev. Stat. § 1-13-714; Fla. Stat. 102.031(4); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. 5/7-41; Md. Code Ann., Election Law § 16-206; Mich. Comp. Laws § 168.744; Minn. Stat. § 204C.06, Subd. 1; Mont. Code Ann. § 13-35-211; Nev. Rev. Stat. § 293.361; N.J. Stat. Ann. § 19:34-7; N.M. Stat. Ann. § 1-20-16; N.Y. Election Law § 5-204; N.D. Cent. Code § 16.1-10-06.2; Ohio Rev. Code Ann. § 3501.30, 35; Or. Rev. Stat. § 260.695; S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111(b); Tex. Elec. Code Ann. § 85.036; Wisc. Stat. § 12.03.

[7] *See* Alaska Stat. § 15.15.170 (200 feet); Ga. Code Ann. § 21-2-414 (150 feet); Haw. Rev. Stat. § 11-132(a) (200 feet); Iowa Code § 39A.4 (300 feet); Kan. Stat. Ann. § 25-2430 (250 feet); Ky. Rev. Stat. Ann. § 117.235(3) (300 feet); La. Rev. Stat. Ann. § 18:1300.6 (600 feet); Me. Rev. Stat. Ann. tit. 21-A, § 682 (250 feet); Mass. Gen. Laws ch. 54, § 65 (150 feet); Miss. Code Ann. § 23-17-57(4) (150 feet); Neb. Rev. Stat. § 32-1524(2) (200 feet); Okl. Stat. tit. 26, § 7-108 (300 feet); S.C. Code Ann. § 7-25-180 (200 feet); Utah Code Ann. § 20A-3-501(2)(a) (150 feet); Wash. Rev. Code § 29A.84.510(1) (300 feet); W. Va. Code § 3-1-37 (300 feet); Wyo. Stat. Ann. § 22-26-113 (300 feet).

smaller areas ranging from ten to seventy-five feet.[8] But all fifty states seemingly recognize that "some restricted zone [around voting booths] is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud," *Burson*, 504 U.S. at 206.[9] No state permits unfettered political activity in or around polling places.

The national consensus and the courts' consistency are noteworthy. Despite claiming confusion and uncertainty, Petitioners cite no post-*Burson* decision invalidating a restriction on petition gathering (or other political activity) within 100 feet of a polling place. Indeed, in the eighteen years since *Burson*, no court has done so—save the district court below.

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[8] *See, e.g.*, Ala. Code § 17-9-50 (30 feet); Ariz. Rev. Stat. § 16-515 (75 feet); Conn. Gen. Stat. § 9-236(a) (75 feet); Del. Code Ann. tit. 15, § 4933 (50 feet); Ind. Code § 3-14-3-16 (50 feet); Mo. Rev. Stat. § 115.637 (25 feet); 25 Pa. Cons. Stat. § 3060 (10 feet); R.I. Gen. Laws § 17-19-49 (50 feet); Va. Code Ann. § 24.2-604 (40 feet).

[9] Petitioners mistakenly suggest that Florida's polling-place restriction is of recent vintage. (Pet. at 5 (stating Florida's first regulation of petition circulation outside polling places was in 1977)). As early as 1895, Florida restricted access to the areas near polling places. *See* Act of May 25, 1895, ch. 4328, § 39, 1895 Fla. Laws 56, 76 ("No person shall be permitted under any pretext whatever to come within fifteen feet of any door or window of any polling room from the opening of the polls until the completion of the count. . . ."). Moreover, Petitioners' attribution of the restriction enacted in 1977 to a "disgruntled Legislature," (Pet. at 5), requires a gross misreading of the cited decision. *See Clean-up '84 v. Heinrich*, 590 F. Supp. 928, 929 (M.D. Fla. 1984).

B. Courts of Appeals Have Unanimously Upheld Petition-Gathering Restrictions.

Given *Burson*'s clarity, it is not surprising that courts have applied it consistently. The Eleventh Circuit's decision is in harmony with those of the two other Courts of Appeals to have considered the issue. Rather than "struggle[ ] to find this balance," (Pet. at 15), courts have uniformly applied *Burson* to uphold polling-place restrictions of political activity.

The Sixth Circuit upheld Ohio's 100-foot protected zone, inside which no person could solicit petition signatures or votes. *See United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 741 (6th Cir. 2004). Plaintiffs—like Petitioners here—hoped to gather petition signatures inside Ohio's "campaign-free zones." *Id.* But the court concluded that, "[i]n keeping with *Burson*," a state may require signature gatherers to stand 100 feet from polling places without "running afoul of the Constitution." *Id.* at 748.

Earlier, the Fifth Circuit reached the same conclusion—upholding a 600-foot protected zone. *See Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994). Political activists wanted to circulate recall petitions on Election Day within Louisiana's 600-foot protected zone. *Id.* at 118-19. The Fifth Circuit characterized the restriction as "posit[ing] the First Amendment's guarantee of the right to free speech against the state's attempt to secure its citizens' right to vote in an environment

free from intimidation, harassment, confusion, obstruction, and undue influence." *Id.* at 119. The court then turned to *Burson*: "This conflict of First Amendment rights necessarily requires a compromise between the two. The Supreme Court addressed this issue head on . . . in *Burson*." *Id.* at 119-20 (citation omitted).[10] The court found Louisiana had a "compelling interest in maintaining campaign-free zones on election day," and it upheld the statute. *Id.* at 119.

The Eleventh Circuit's decision is consistent with *Burson*, *United Food*, and *Schirmer*. Each of these rejected arguments that Petitioners here offered, and each upheld a content-based statute restricting political activities near polling places. In this case, the Eleventh Circuit reversed the only court—at least since *Burson*—to invalidate a restriction on political activities within 100 feet of polling places. There is uniformity in the law, and additional review is unnecessary.

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[10] After the Fifth Circuit decided *Schirmer*, the Louisiana Supreme Court invalidated the 600-foot restriction, but only because it was so much larger than the protected zone approved in *Burson*:

> Although we do not regard as unduly onerous such a prohibition (on all political activity) within the narrow confines approved in *Burson* (100 feet), when that blanket proscription on political speech is extended to 600 feet we find that "a difference only of degree" becomes a difference of kind, a difference of "constitutional dimension."

State v. Schirmer, 646 So. 2d 890, 901 (La. 1994) (quoting *Burson*).

C. The Eleventh Circuit Applied the Correct Legal Standard.

Petitioners next contend that the Eleventh Circuit erroneously created a new standard under which exit polling is not restricted, but political speech is. (Pet. at 24.) That Florida's statute is content based is not novel—it is consistent with *Burson*. *Burson* rejected the argument that "the failure to regulate all speech render[ed] the statute fatally underinclusive." *Burson*, 504 U.S. at 207. "The First Amendment does not require States to regulate for problems that do not exist." *Id.* And since *Burson*, courts have treated exit polling and political speech differently.

Petitioners continue to suggest that "there is no constitutionally meaningful difference between" exit polling and their political solicitation. (Pet. at 26.) This wishful declaration is contrary to numerous decisions, including several on which Petitioners rely. *See, e.g.*, *Burson*, 504 U.S. at 207 (no evidence of fraud caused by exit pollsters, unlike political workers); *Schirmer*, 2 F.3d at 122 ("We reject the application of the exit-polling cases to the present context [signature gathering] because the underlying state interests differ in each case."); *ABC v. Blackwell*, 479 F. Supp. 2d 719, 738 (S.D. Ohio 2006) ("[E]xit polling cannot reasonably be construed as a form of electioneering under any definition of that term."); *CBS v. Cobb*, 470 F. Supp. 2d 1365, 1371 (S.D. Fla. 2006) ("[E]xit polling is significantly distinguishable from the electioneering and campaigning [in *Burson*].").

The Eleventh Circuit likewise recognized the distinction: "[E]xit polling does not include advocating for the success of some political proposal or candidate." (Pet. App. at 12a n.11.) "Moreover, the plurality in *Burson* expressly said that the Tennessee statute did not need to prohibit exit polling to survive strict-scrutiny review." (*Id.*) Exit polling is different, and courts and legislatures have treated it so.[11]

Petitioners also mistakenly suggest that the Eleventh Circuit "re-define[d] the compelling state interest endorsed by *Burson*" because the opinion was "actually grounded" in interests not recognized by *Burson*. (Pet. at 26.) Petitioners misread the Eleventh Circuit's opinion: "The State contends that it shares the same compelling interests as Tennessee in *Burson*: (1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the

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[11] Florida is hardly alone in expressly excepting exit polling from polling-place restrictions. *See, e.g.*, Del. Code Ann. tit. 15, § 4933(b-c); Me. Rev. Stat. Ann. tit. 21-A, § 682(2); Neb. Rev. Stat. § 32-1525; Okl. Stat. tit. 26, § 7-108.1; Wyo. Stat. Ann. § 22-26-113. Moreover, Petitioners overstate the significance of the exit-polling exception, contending that the absence of a statutory definition allows political operatives to abuse the exception. (Pet. at 24-25.) No statutory definition is necessary: an exit poll is "[a]n unofficial poll in which people leaving a polling station are asked how they have voted, used in predicting the result of an election." *OXFORD ENGLISH DICTIONARY (2d Ed., Vol. V 1989)*. Other types of polls—such as political "push polls" Petitioners reference (Pet. at 25)—are prohibited by the statute. *See* Fla. Stat. § 102.031(4)(b) (2009) (prohibited solicitation includes conducting polls other than exit polls).

election process. Plaintiffs take no issue with the presence or legitimacy of those compelling interests in this case. Nor do we." (Pet. App. at 11a.) The Eleventh Circuit did not redefine any standard; it faithfully applied *Burson*.

Finally, Petitioners incorrectly contend the Eleventh Circuit did not consider their constitutional rights. (Pet. at 15.) In fact, the court "accept[ed] that the right to engage in political discourse is 'the essence of self-government.'" (Pet. App. at 17a (quoting *Garrison v. Louisiana*, 309 U.S. 81 (1964))). But the court—just as in *Burson*—had to balance competing interests: "The Florida statute . . . balances the right to engage in political speech against the right to vote without interference and harassment . . . ." (Pet. App. at 17a.) The court's balancing was consistent with *Burson* and consistent with the First Amendment.

D. This Case Presents a Poor Means of Reviewing the Question Presented.

Even if the Court determined that the issue presented in this case warranted review, this is not an appropriate case in which to undertake that review. The order challenged here is interlocutory, not final, and does not fall within the narrow class of cases in which the Court has found interlocutory review to be warranted. Moreover, this case will never reach final judgment. Based upon Petitioners' representation that they sought no further relief (beyond attorney's fees), the district court dismissed the

underlying case as moot. (R.39.) Therefore, if this Court grants the petition, it will be spending its precious resources reviewing a preliminary determination in a case Petitioners themselves have abandoned on the merits.

This Court does not commonly review the grant or denial of a preliminary injunction. This is because preliminary proceedings by their nature are accelerated and abbreviated, not lending themselves to the creation of a proper record upon which to decide important issues. Because the purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held . . . and [because of] the haste that is often necessary if those positions are to be preserved," preliminary injunctions are often granted with less formality and less complete evidence than a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). These characteristics provide less than ideal ingredients for meaningful appellate review. *See id.* at 396 (because parties to preliminary injunction proceeding generally do not have a full opportunity to present their cases, even where injunctive aspects of case become moot, any remaining issues generally must be resolved in a trial on the merits rather than by appeal); *see also City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 171-72 (1927) (declining to reach novel and far-reaching questions raised in review of preliminary injunction proceeding until the facts essential to their decision were "definitely found by the lower courts upon adequate evidence").

The proceedings below were typical of expedited preliminary injunction proceedings. Petitioners initiated the action just fifteen days before the primary election, Secretary Browning filed his responsive memorandum the next week, and the hearing followed two days later. (R. 1:¶ 14, R.11, R.15.) There was no discovery. Both sides submitted legal arguments and witness declarations, but neither presented live testimony. (R.2, Exh. A-B; R.9, 11, 15.) The district court rendered its decision the day after the hearing—the Friday before the Tuesday primary election. (Pet. App. at 42a-44a.) The court concluded that Respondents had not made a sufficient showing to support the challenged law "at this stage of the proceedings." (*Id.* at 35a.)

In this Court, Petitioners repeatedly cite and attempt to rely upon "record evidence" adduced—or not adduced—in the proceedings below. (*See, e.g.*, Pet. at 9 ("Petitioners presented a variety of statistical, geographic, and affidavit evidence demonstrating that . . . ."); *id.* at 11 ("Respondents provided only anecdotal affidavit evidence."); *id.* at 11 (noting Respondents' affidavits were not "supported by any documentary evidence")). They even state that "the record evidence in this case is that petition circulators in Florida have not caused any electoral abuses," and suggest that the district court's "findings of fact stood on appeal." (*Id.* at 13 n.5, 23-24.) But Petitioners wholly ignore the preliminary posture of the case and the effect of this posture on the appropriateness of Supreme Court review.

This Court has found it appropriate to review interlocutory orders in certain limited circumstances, none of which is present here. Review is warranted when the issue presented is "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)). This consideration is not present here, as the underlying case was dismissed as moot. Review of an interlocutory decision also may be warranted when the decision raises important questions of jurisdiction that ostensibly conflict with the decisions of other circuits. *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 192-93 (1974). The issues raised in the present appeal do not relate to jurisdiction and, as discussed in Section B, *supra*, there is no conflict with other circuits. This case presents none of the special circumstances this Court has identified as warranting review of an interlocutory order.

Additionally, Respondents lost any ability to present a case on the merits when Petitioners abandoned their case below. (*See* Pages 2-3 & n.2, *supra*.) At Petitioners' urging, the district court dismissed the case as moot while the interlocutory appeal proceeded. (R.39; *see also* Note 2, *supra*.) Ordinarily, when an underlying case becomes moot while an appeal from a preliminary injunction order is pending, it is appropriate to vacate the judgment below. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). This procedure "clears the path for future relitigation of the issues between the parties" and eliminates a judgment which, by "happenstance,"

was not subject to review. *Id.* at 40. Neither side has urged that result in this case. Respondents successfully argued that the Eleventh Circuit had jurisdiction because the dispute was "capable of repetition, yet evading review." (Appellants' Initial Br., *Citizens for Police Accountability Political Comm. v. Browning*, Case No. 08-15115-D, at 1-2 (11th Cir.), filed Nov. 3, 2008; Pet. App. at 5a n.5.) Petitioners did not affirmatively assert application of this doctrine, but neither did they seek dismissal of the interlocutory appeal. Indeed, by pursuing a writ of certiorari in this Court, Petitioners implicitly assert the applicability of this mootness exception. Yet they affirmatively asserted mootness as the ground for declining to proceed to a trial on the merits, and for dismissal of Respondents' separate appeal of the dismissal order. (R.35:3; R.39; Note 2, *supra*.)

It would be anomalous if, by asserting mootness to justify abandoning pursuit of a final judgment—but not asserting mootness for purposes of the Eleventh Circuit's review of the preliminary injunction—Petitioners could not only escape the ordinary result of having the order vacated but also successfully obtain this Court's rare review of an interlocutory order on a limited trial court record.

For all of these reasons—the interlocutory nature of the order to be reviewed, the limited proceedings below, and Petitioners' subsequent abandonment of the case on the merits—this case is not an appropriate one for this Court's review of the question presented.

CONCLUSION

This case requires no additional review. The Eleventh Circuit's decision faithfully applied this Court's precedent and was consistent with decisions of other Courts of Appeals. This area of the law is well settled, certain, and clear. Moreover, even if clarification were required, this is not an appropriate case to supply it. The district court issued its preliminary order—based on a limited factual record—just days after the case began, and the case never reached final judgment. This Court should deny the petition.

Respectfully submitted,

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Appendix:
Survey of Polling-Place Restrictions

Ala. Code § 17-9-50	"[N]o person shall be permitted within 30 feet of the door of the building of the polling place."
Alaska Stat. § 15.15.170	"[A] person . . . within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question."
Ariz. Rev. Stat. § 16-515(A)	"[A] person shall not be allowed to remain inside the seventy-five foot limit . . . and . . . no political or electioneering materials may be displayed within the seventy-five foot limit."
Ark. Code Ann. § 7-1-103(a)(9)(A)	"[N]o person shall . . . solicit signatures on any petition . . . or do any electioneering of any kind whatsoever in the building or within one hundred feet (100') of the primary exterior entrance . . . ."
Ca. Elec. Code § 18370	"No person . . . shall, within 100 feet of a polling place . . . [c]irculate an initiative, referendum, recall, or nomination petition or any other petition . . . [or d]o any electioneering . . . ."
Colo. Rev. Stat. § 1-13-714	"No person shall do any electioneering . . . within one hundred feet of any building in which a polling place is located . . . . 'Electioneering' also includes soliciting signatures . . . ."

Conn. Gen. Stat. § 9-236(a)	"[N]o person shall . . . loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet . . . ."
Del. Code Ann. tit. 15, § 4933	"(b) No other person except as noted below shall be permitted within 50 feet of any entrance to the building used by voters. (c) Media and persons conducting exit polls shall be permitted within the 50-foot exclusion zone."
D.C. Mun. Regs. tit. 3, § 708.4	"No partisan or nonpartisan political activity . . . shall be permitted . . . within [50 feet] outside the building . . . ."
Ga. Code Ann. § 21-2-414	"(a) No person shall solicit votes in any manner . . . [w]ithin 150 feet of the . . . polling place is established . . . . (b) No person shall solicit signatures for any petition on any primary or election day . . . [w]ithin 150 feet . . . ."
Haw. Rev. Stat. § 11-132(a)	"Any person who remains or loiters within an area of two hundred feet from the . . . polling place and its appurtenances for the purpose of campaigning shall be guilty of a misdemeanor."

Idaho Code § 18-2318(1)	"[N]o person may, . . . within one hundred (100) feet [of a polling place]: (a) Do any electioneering; (b) Circulate cards or handbills of any kind; [or] (c) Solicit signatures to any kind of petition . . . ."
10 Ill. Comp. Stat. 5/7-41(c)	"No person shall do any electioneering or soliciting of votes . . . within one hundred feet of any polling place . . . ."
Ind. Code § 3-14-3-16(b)	"A person who knowingly does any electioneering: . . . within . . . the chute [defined as area fifty feet from the entrance to the polls, *see* Ind. Code. § 3-5-2-10] . . . commits a Class A misdemeanor."
Iowa Code § 39A.4.1.a. (1)	"Loitering, congregating, electioneering, posting signs, treating voters, or soliciting votes . . . , either on the premises of a polling place or within three hundred feet . . . [is unlawful]."
Kan. Stat. Ann. § 25-2430	"(a) Electioneering is knowingly attempting to persuade or influence eligible voters . . . within a radius of 250 feet from the entrance. (c) Electioneering is a class C misdemeanor."
Ky. Rev. Stat. Ann. § 117.235(3)	"No person shall electioneer . . . within a distance of three hundred (300) feet [of the polling-place entrance] . . . . Electioneering shall include . . . the soliciting of signatures to any petition . . . ."

La. Rev. Stat. Ann. § 18:1300.6	"It shall be unlawful for any person to circulate recall petitions . . . within a radius of six hundred feet of the entrance to any polling place . . . ."
Me. Rev. Stat. Ann. tit. 21-A, § 682(2)	"On public property within 250 feet of the entrance to the voting place . . . a person may not: A. Influence another person's decision regarding a candidate or question that is on the ballot . . . ."
Md. Code Ann., Election Law § 16-206	"A person may not: . . . canvass, electioneer, or post any campaign material in the polling place or beyond a line established by signs posted . . . . The line shall be located as near as practicable to 100 feet from the entrance . . . ."
Mass. Gen. Laws ch. 54, § 65	"No person shall be allowed to collect signatures upon petitions . . . within one hundred and fifty feet from the building entrance door to a polling place."
Mich. Comp. Laws § 168.744	"[Any person] within 100 feet from any entrance . . . shall not persuade or endeavor to persuade a person to vote for or against any particular candidate . . . . A person shall not . . . request or obtain signatures on petitions . . . within 100 feet from any entrance . . . ."

Minn. Stat. § 204C.06, Subd. 1	"No one except an election official or an individual who is waiting to register or to vote shall stand within 100 feet of the building in which a polling place is located."
Miss. Code Ann. § 23-17-57(4)	"It is unlawful for any person to solicit signatures on any petition . . . within one hundred fifty (150) feet of any polling place on any election day."
Mo. Rev. Stat. § 115.637 (18)	"[E]lectioneering, distributing election literature, [or] posting signs . . . with respect to any candidate or question to be voted on at an election on election day . . . within twenty-five feet of the building's outer door . . . [is unlawful]."
Mont. Code Ann. § 13-35-211(1)	"A person may not do any electioneering on election day within . . . 100 feet of any entrance . . . ."
Neb. Rev. Stat. § 32-1524(2)	"No person shall do any electioneering, circulate petitions, or perform any action that involves solicitation . . . within two hundred feet of any such polling place or building."
Nev. Rev. Stat. § 293.361	"[A] person may not electioneer for or against any candidate, measure or political party in or within 100 feet from the entrance to the voting area."

N.H. Rev. Stat. Ann. § 659:43(II)	"No person who is a candidate for office or who is representing or working for a candidate shall . . . perform any electioneering activities . . . within a corridor 10 feet wide and extending a distance from the entrance door . . . ."
N.J. Stat. Ann. § 19:34-7	"[N]or shall any person within the polling place or within a hundred feet thereof, loiter, electioneer, or solicit any voter."
N.M. Stat. Ann. § 1-20-16	"Electioneering too close to the polling place consists of any form of campaigning on election day within one hundred feet of the building . . . ."
N.M. Stat. Ann. § 1-20-17	"Obstructing the polling place consists of . . . approaching nearer than fifty feet from any polling place . . . ."
N.Y. Election Law § 5-204(9)	"[N]o person shall do any electioneering within the polling place, or within a one hundred foot radial . . . ."
N.C. Gen. Stat. § 163-166.4(a)	"No person . . . shall . . . solicit votes, or otherwise engage in election-related activity in the voting place or in a buffer zone . . . . In determining the dimensions of that buffer zone . . . [officials] shall, where practical, set the limit at 50 feet from the door of entrance to the voting place . . . ."

N.D. Cent. Code § 16.1-10-06.2	"A person may not approach a person attempting to enter a polling place . . . or who is leaving a polling place for the purpose of gathering signatures for any reason. These prohibitions apply in any polling place or within one hundred feet [30.48 meters] from any entrance . . . ."
Ohio Rev. Code Ann. § 3501.35 (A)	"[N]o person shall . . . engage in any kind of election campaigning within the area between the polling place and the small flags of the United States . . . . [which shall be 100 feet from the polling place, *see* Ohio Rev. Code Ann. § 3501.30]."
Okl. Stat. tit. 26, § 7-108	"No person shall be allowed to electioneer within three hundred (300) feet of any ballot box . . . ."
Or. Rev. Stat. § 260.695(2)	"A person may not do any electioneering, including . . . soliciting of signatures to any petition, . . . within 100 feet . . . ."
25 Pa. Cons. Stat. § 3060(d)	"All persons . . . must remain at least ten (10) feet distant from the polling place during the progress of the voting."

R.I. Gen. Laws § 17-19-49	"No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to the voters shall be distributed or displayed within the voting place or within fifty (50) feet of the entrance . . . ."
S.C. Code Ann. § 7-25-180(A)	"It is unlawful on an election day within two hundred feet of any entrance . . . to distribute any type of campaign literature or place any political posters."
S.D. Codified Laws § 12-18-3	"[N]o person may . . . within one hundred feet from any entrance leading into a polling place, . . . display campaign posters, signs, . . . or conduct any petition signature gathering . . . ."
Tenn. Code Ann. § 2-7-111(b)	"Within the appropriate boundary [100 feet], . . . the display of campaign posters, signs or other campaign materials . . . are prohibited . . . . [A] solicitation or collection for any cause is prohibited."
Tex. Elec. Code Ann.§ 61.003(a)	"A person commits an offense if . . . within 100 feet of an outside door through which a voter may enter the building in which a polling place is located, the person . . . electioneers for or against any candidate, measure, or political party."

Utah Code Ann. § 20A-3-501(2)(a)	"A person may not, . . . within 150 feet of the building where a polling place is located: (i) do any electioneering; [or] . . . (iii) solicit signatures to any kind of petition . . . ."
Vt. Stat. Ann. tit. 17, § 2508(a)	"[Official to insure that] [w]ithin the building containing a polling place, no campaign literature, . . . or other political materials are displayed, placed, handed out or allowed to remain; and . . . On the walks and driveways leading to a building in which a polling place is located, no candidate or other person may physically interfere with the progress of a voter to and from the polling place."
Va. Code Ann. § 24.2-604(A)	"[I]t shall be unlawful for any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; [or] (ii) within such distance to give . . . campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote . . . ."
Wash. Rev. Code § 29A.84.510(1)	"[N]o person may . . . in any public area within three hundred feet of any entrance to such polling place: (a) Suggest or persuade or attempt to suggest or persuade any voter to vote for or against any candidate or ballot measure; [or] . . . (c) Solicit signatures to any kind of petition . . . ."

W. Va. Code § 3-9-9	"No person may do any electioneering on election day . . . within three hundred feet of the outside entrance to the . . . polling place."
Wisc. Stat. § 12.03(2)(b)1	"No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place."
Wyo. Stat. Ann. § 22-26-113	"Electioneering too close to a polling place on election day . . . consists of any form of campaigning, . . . the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards of the building . . . ."

No. 09-861

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IN THE

Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE,
Petitioner,

—and—

FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Petitioner,

—v.—

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida,
Respondent,

—and—

SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Citizens for Police Accountability Political Committee has no parent, subsidiary or affiliated corporations. Petitioner Florida State Conference of the NAACP is a unit of the National NAACP, which is a nonprofit corporation incorporated in New York with its principal place of business in Maryland. It does not issue stock.

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ARGUMENT

As this Court recently explained, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 130 S. Ct. 836, 898 (2010) (citation omitted). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Id.* "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.*

The law at issue in this case – Florida Statutes Section 102.031(4)(a)-(b) (2008) (the "Challenged Law") – suppresses political speech. It does this by prohibiting Petitioners, who wish to obtain petition signatures from exiting voters, from speaking near polling places. *Id.* But it simultaneously permits media and non-media exit pollsters to ask the same exiting voters questions on a nearly unlimited number of topics. As this Court recognizes, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United*, 130 S. Ct. at 898. The Challenged Law undoubtedly identifies certain preferred – and certain disfavored – speakers. As applied to Petitioners' speech, it is unconstitutional.

All 50 states limit some speech around polling places, but not in a consistent or uniform way. Because the Challenged Law embodies the inconsistency in these laws, review of this case would

enable the Court to revisit its decision in *Burson v. Freeman*, 504 U.S. 191 (1992), and to clarify the proper application of First Amendment principles to polling-place speech restrictions.

1. The State's Opposition Brief Ignores the Key Dispute in this Case.

In opposing the Petition, the State ignores the single most important issue in this case – the fact that Petitioners sought to obtain signatures only from *exiting* voters. This fact is critical not only to the merits of this case, but also to why the Court should review it.

In the seventeen years since this Court's plurality decision in *Burson v. Freeman*, 504 U.S. 191 (1992), every court that has considered a challenge to a polling-area speech prohibition, brought by a plaintiff seeking to speak to voters *after* they have voted, has found the prohibition to be unconstitutional. *See, e.g.*, *Amer. Broad. Co. v. Ritchie*, No. 08-5285, 2008 WL 4635377, at *6 (D. Minn. Oct. 15, 2008); *Amer. Broad. Co. v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 WL 3149365, at *12 (D. Nev. Nov. 1, 2006); *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365, 1370 (S.D. Fla. 2006); *Amer. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006). The Eleventh Circuit's decision is in conflict with these cases.

In its Opposition, the State has nothing to say about the exit-speech cases. It cannot explain why exit speech by a media pollster must be permitted

under the First Amendment but exit speech by a petition circulator (speaking about an issue not on the current ballot) can be prohibited. Nor can it explain why the Challenged Law permits anyone to conduct an exit poll on any subject, but prohibits petition circulators from engaging in essentially indistinguishable speech. Indeed, save for a single quotation from the district court's decision (Opp. at 2), the Opposition Brief never even mentions the fact that Petitioners sought to engage solely in *exit petitioning*.

Rather than address the primary point made in the Petition for Writ of Certiorari – that this case should be reviewed because exit petitioning is different from the speech at issue in *Burson* (*i.e.*, vote solicitation) – the State acts as if it is a settled point of law that exit petitioning is simply another form of "political speech" or "electioneering." The State adopts this position in order to rely on those cases that have suggested that there is a constitutionally significant distinction between exit polling and electioneering, and that while exit polling must be permitted, electioneering can be banned. *See, e.g.*, *Cobb*, 470 F. Supp. 2d at 1371 ("exit polling is significantly distinguishable from the electioneering and campaigning [in *Burson*]").

The problem with this argument, however, is that it is contrary to the State's own position. In an earlier case involving a prior version of the Challenged Law, the State took the position that petition circulation is not "electioneering" and that "[p]etition circulation is different than vote solicitation." *See* Defendant Cobb's Memorandum of

Law in Opposition to Plaintiffs' Motion for Preliminary Injunction at 11, *CBS Broad. Co. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006), 2006 WL 3668126. Moreover, the State's effort to distinguish the undefined "exit polling" permitted under the Challenged Law from so-called "political speech" is based not on any definition or guidance provided by the Challenged Law, and not on any record evidence in this case or in the legislative history of the Challenged Law, but merely on the State's bald assertion.

The fact remains – as the Eleventh Circuit noted – that *Burson* concerned a narrow set of facts different from the facts at issue in this case. (App. at 11a.) The fact also remains that courts are in conflict about how to apply *Burson* to statutes that prohibit speech different from the campaign speech prohibited by the Tennessee statute at issue in *Burson* (*i.e.*, speech by candidates and their campaign workers soliciting votes from voters on their way into the polls).

As described in the Petition, confusion about the application of *Burson* in the real world is an undeniable fact. (Pet. at 21-23.) For example, the New Jersey Supreme Court understands *Burson* as authorizing a state to prohibit "all expressive activity" near polling places. *In re: Attorney General's "Directive on Exit Polling: Media and Non-partisan Public Interest Groups," Issued July 18, 2007*, 981 A.2d 64, 82 (N.J. 2009). The federal district court in New Jersey, by contrast, reads *Burson* to mean that the state cannot prohibit exit polling absent record

evidence that such a prohibition is necessary to further a compelling state interest. *See Amer. Broad. Co. v. Wells*, 669 F. Supp. 2d 483, 489 (D.N.J. 2009) ("While no one disputes that voter intimidation and fraud are compelling government interests, there is no historical evidence that the concern is addressed in any way by prohibiting exit polling by the Plaintiffs."). It also reads *Burson* as having little if any application to exit-speech cases because "it is conduct affecting voters on their way to the polls that the government may have an interest in protecting." *Id.* at 488. Both decisions cannot be right.

The same inconsistency exists between the Eleventh Circuit's decision in this case and the decision of the district court for the Southern District of Florida in *Cobb*. *Cobb* required the state to provide evidence that a ban on exit polling was necessary. 470 F. Supp. 2d at 1369. In this case, the Eleventh Circuit ruled that evidence showing that the Challenged Law was necessary was not needed, but it did not overrule or even mention *Cobb*. (App. at 16a.) Again, both decisions cannot be right. Lower courts are applying *Burson* inconsistently.

As this Court recently affirmed in *Citizens United*, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." 130 S. Ct. at 898.[1] If this is an

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[1] In more concrete terms, the Court confirmed that a law oppressing core First Amendment speech must satisfy strict

(continued on next page)

accurate description of the protections applicable to political speech under the First Amendment, then it counsels in favor of a narrow reading of *Burson*. The State and the Eleventh Circuit, however, read *Burson* broadly. Review of this case will permit the Court to provide guidance and clarification to the states, to grassroots political organizations, and to the lower courts about the First Amendment protections afforded expressive speech and activity near polling places.

2. This Case Presents a Sufficient Factual Record for Review by this Court.

The State's procedural arguments against granting the writ of certiorari are neither factually compelling nor internally consistent.

The State's procedural arguments are not compelling because they are contrary to this Court's actual practice. For example, the State maintains that "[t]his Court does not commonly review the grant or denial of a preliminary injunction" (Opp. at 15), but in fact this Court has taken up numerous preliminary injunction cases in recent years, a

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scrutiny analysis, "which *requires* the Government *to prove* that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 130 S. Ct. at 898 (quoting *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (emphasis added). Here, the Eleventh Circuit ignored this requirement and expressly rejected the proposition "that the State *must offer its own evidence* demonstrating that the ban on exit solicitation is necessary to serve its compelling interest." (App. at 16a (emphasis added).)

number of which have involved First Amendment claims. *E.g.*, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 370 (2008); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006); *McCreary County, Ky. v. A.C.L.U. of Ky.*, 545 U.S. 844, 854-58 (2005); *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 660-61 (2004). Indeed, just this term the Court has granted review in two preliminary injunction cases, one of which concerns First Amendment rights. *See Nelson v. NASA*, 530 F.3d 865, 872 (9th Cir. 2008), *cert. granted*, 78 U.S.L.W. 3517 (U.S. Mar. 8, 2010) (No. 09-530); *Doe v. Reed*, 586 F.3d 671, 673 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-559). Thus, the fact that this case concerns the reversal of a grant of a preliminary injunction does not render it an inappropriate case for certiorari review.

The State's procedural argument also is not compelling because it grossly overstates the limited opportunity to develop an evidentiary record below. The State argues that because this case arises from a preliminary injunction, there was little record evidence for the district court or Eleventh Circuit to consider. (*See generally* Opp. at 16-17.) What the State fails to mention is that any evidence of fraud or intimidation at the polls caused by petition circulators would be exclusively in the State's hands, but the State did not present any such evidence to the district court. Indeed, despite the fact that during a recent 16-year period (from 1989 to 2005) Florida permitted petition circulators to gather near polling places, the State did not identify in its possession a single document evidencing a complaint or concern

from any voter about exit-petition circulation (or any other type of petition circulation) near polling places anywhere in the State. Given that Florida's laws requiring the maintenance of – and access to – public records are among the most robust in the nation, *see, e.g.*, Fla. Const. Art. I, § 24, this lack of any documentary evidence is revealing. The fact of the matter is that there could not realistically be any further development of the evidentiary record in this case because evidence that the Challenged Law is necessary with respect to prohibiting petition circulation does not exist. The Challenged Law is not based on evidence, it is based on speculation.

Moreover, the State's concerns about the purported dearth of the evidentiary record should be viewed in light of the position it took before the Eleventh Circuit. There, the State argued that the court could decide the merits of the case without reference to the facts, but it also argued, contrary to the position it now takes, that "the record includes specific evidence" and "[i]f strict proof were required, this uncontroverted evidence would be sufficient." (Appellant's Initial 11th Cir. Br. at 33 & 34.)

The State's procedural arguments about mootness also are not consistent with the position the State took before the Eleventh Circuit. As explained in the Petition for Writ of Certiorari, after the district court granted the preliminary injunction, Petitioners circulated their petition near polling places on August 26, 2008, and gathered the requisite number of signatures. Because Petitioners were not seeking any further relief before the district court (*i.e.*, they were

not seeking to gather any more petition signatures), they took the logical position that the case had become moot.

In the Eleventh Circuit, Petitioners could have attempted to avoid review by arguing that the appeal too was moot, but they did not. Rather, Petitioners acceded to the argument put forth by the State that the case was not moot because it was capable of repetition yet evading review. The State now castigates Petitioners for seeking review of a "moot" case in this Court, but the State certainly did not view the case as moot when review of the case was something it desired. To borrow the State's wording (*see* Opp. at 18), it would be anomalous indeed if the State could obtain Eleventh Circuit review and reversal of the district court's grant of a preliminary injunction by arguing that the case is not moot, but avoid this Court's definitive review by now claiming the case is moot.

A denial of review on mootness grounds would also be contrary to the approach this Court often has taken in election-related cases, where the election at issue frequently occurs before this Court can provide review. In those circumstances, the Court recognizes that purported mootness typically is not a compelling reason to deny review.

For example, in *Storer v. Brown*, 415 U.S. 724 (1974), a case arising out of the 1972 California congressional and presidential elections, the Court granted review despite the fact that, by the time the case reached the Court, the 1972 election was "long

over." *Id.* at 737. The Court explained that "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.* at 737 n.8. Other decisions from this Court are in accord. *See, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (explaining that the "capable of repetition, yet evading review" doctrine for election cases applied to both as-applied and facial challenges); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300 n.12 (1979) (stating that "[t]here is value in adjudicating election challenges notwithstanding the lapse of a particular election") (citing *Storer*); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974) (relying on *Storer*, among other cases, and explaining that with respect to mootness, "[t]he important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society").

CONCLUSION

Earlier this year, this Court explained that there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion." *Citizens United*, 130 S. Ct. at 899. Moreover, "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Id.* at 891. The Challenged Law does not give the

benefit of the doubt to protecting speech. Nor does the Eleventh Circuit's decision. The Court should grant the Petition for Writ of Certiorari to protect Petitioner's core First Amendment speech, to reverse the Eleventh Circuit, to clarify the effect of *Burson v. Freeman*, and to provide much needed guidance to the lower courts on how to analyze polling-place speech restrictions.

Respectfully submitted,

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In the Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE, et al.,
Petitioners,

v.

KURT S. BROWNING, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, THE RUTHERFORD INSTITUTE, NATIONAL VOTER OUTREACH, INC., THE INITIATIVE AND REFERENDUM INSTITUTE, CITIZENS IN CHARGE FOUNDATION, AND THE BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF MARION B. BRECHNER FIRST AMENDMENT PROJECT, THE RUTHERFORD INSTITUTE, NATIONAL VOTER OUTREACH, INC., THE INITIATIVE AND REFERENDUM INSTITUTE, CITIZENS IN CHARGE FOUNDATION, AND BRECHNER CENTER FOR FREEDOM OF INFORMATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Movants the Marion B. Brechner First Amendment Project, The Rutherford Institute, National Voter Outreach, Inc., The Initiative and Referendum Institute, Citizens in Charge Foundation, and the Brechner Center for Freedom of Information (the "Movants") hereby request leave to file the accompanying *amici curiae* brief in this case. The proposed brief will be submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Petitioners Citizens for Police Accountability Political Committee and Florida State Conference of the National Association for the Advancement of Colored People have consented to the filing of this brief. Respondents Kurt S. Browning and Sharon L. Harrington, in their respective official capacities as Secretary of State of the State of Florida and Supervisor of Elections of Lee County, have not consented.

INTERESTS OF THE AMICI CURIAE

As set forth in the accompanying brief, Movants are non-profit, non-partisan organizations committed to protecting civil liberties, including the First Amendment freedoms of speech and petition that are central to the above-captioned case, and non-partisan organizations dedicated to petition solicitation and direct democracy.

ISSUES ADDRESSED BY MOVANTS IN BRIEF

At the heart of this case is a Florida statute that restricts political expression based upon its content. The Eleventh Circuit ruled that the statute was constitutional as applied to Petitioners' speech directed to voters after they exited the polls. In their proposed brief, Movants address two reasons why this Court should grant the Petition for Writ of Certiorari. First, the Eleventh Circuit's Opinion creates substantial uncertainty and conflict about the evidentiary burden the State must meet to ban political speech. Indeed, the Opinion establishes a lower evidentiary burden for banning political speech than the burden the State must meet in cases involving lesser levels of constitutional scrutiny, such as cases concerning adult entertainment zoning ordinances. This illogical disparity should be addressed by the Court.

Second, the brief addresses the conflicting decisional law governing the constitutionality of statutes that distinguish between similarly situated speakers, and the substantial need for this Court to clarify the law.

ASSISTANCE TO BE RENDERED TO THE COURT BY MOVANTS

Movants' proposed brief will assist this Honorable Court by providing a First Amendment-based perspective on the impact of the Eleventh Circuit's Opinion that is different from – and broader than – Petitioners' perspective. The proposed brief also will analyze issues not fully addressed in the Petition for Writ of Certiorari. For example, the brief will consider this Court's recent decision in *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856 (Jan. 21, 2010), a decision rendered after the Petition for Writ of Certiorari was filed and therefore not addressed therein. As the brief argues, *Citizens United* is important to this Court's consideration of the Petition for Writ of Certiorari because it held unconstitutional a statute that – like the Florida statute at issue in this case – distinguishes among similarly situated speakers. Movants' brief will help ensure a full presentation of the issues to this Court.

CONCLUSION

Movants are gravely concerned by the unclear evidentiary standard the State must meet before restricting political speech near polling

places and the broad impact this lack of clarity will have on the ability of citizens to exercise their First Amendment rights of speech, petition, and association. Given the paramount importance of political speech, irrespective of its content, the undersigned Movants respectfully request they be granted leave to file the attached *amici curiae* brief in order to present additional arguments and viewpoints as to why the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

This brief, filed in support of Petitioners, Citizens for Police Accountability Political Committee and Florida State Conference of the National Association for the Advancement of Colored People (collectively "Petitioners"), is submitted to the Court with the consent of counsel for Petitioners and without the consent of Respondents who withheld consent. As detailed below, *amici curiae* are committed to protecting civil liberties, including the First Amendment freedoms of speech and petition that are central to this case. Because of the potential impact this litigation could have on First Amendment speech and petition rights throughout the country, *amici* have a strong and direct interest in the outcome of this case.

The Marion B. Brechner First Amendment Project, formerly known as the Marion Brechner Citizen Access Project, is a non-profit, non-partisan organization located at the University of Florida in Gainesville, Florida. It is

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rules 37.2(a) and 37.2(b), counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae's* intention to file this brief.

dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

The Rutherford Institute ("Rutherford") is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, Rutherford specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

National Voter Outreach, Inc. ("NVO"), a Nevada corporation, is a political consulting firm specializing in organizing the collection of signatures to qualify issues and candidates for ballots nationwide. NVO has conducted successful campaigns in forty-three states, organizing the collection of more than 30 million signatures. NVO has organized a number of drives where collecting signatures at the polls was critical to success. NVO has been conducting signatures drives in Florida since 1984. A decision in this case will directly affect NVO, its employees and contractors, and the signature drives it organizes.

The Initiative and Referendum Institute (the "Institute") is a non-profit, nonpartisan educational institution headquartered at the University of Southern California. The Institute's mission is to provide information to the

public, scholars, policymakers, and journalists about ballot propositions, and to promote the study of direct democracy. The Institute was established in 1998, in recognition of the initiative and referendum process's influence on America. Its interest is to protect and improve democratic processes.

Citizens in Charge Foundation (the "Foundation") is a non-profit, non-partisan organization dedicated to protecting the initiative and referendum rights of citizens across the country through educational programs and, when necessary, by participating in litigation. Founded in 2003, the Foundation believes every citizen should have an open and accessible process for initiating simple statutes and constitutional amendments as well as referring legislative acts to a popular vote. The organization has worked with citizens and legislators nationwide and taken part in numerous state and federal court cases.

The Brechner Center for Freedom of Information (the "Center") at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance.

SUMMARY OF ARGUMENT

This First Amendment case pivots on four points: 1) the right of citizens to engage in core political speech; 2) citizen participation in the political process; 3) differential treatment of citizens because of the content of their messages; and 4) the evidentiary burden that should be imposed on the government to prove that its interests in guarding against voter fraud and protecting the integrity of elections actually justify the censorship of speech of citizens peacefully seeking to obtain signatures from other citizens after they have voted.

Petitioners do not want to speak with citizens *before* they vote. Instead, they wish only to speak with citizens *after* they have voted in order to seek signatures on a petition to put an issue on the ballot. Florida Statutes Section 102.031(4)(a)-(b) (2008), however, prohibits them from engaging in such speech within 100 feet of the entrance to any polling place.

Yet a different category of speaker is treated in dramatically different fashion under this same section. In particular, all individuals conducting exit polls, regardless of whether they are members of the news media, are allowed to speak within the same zone to the very same citizens who just voted. There is no empirical data on the record in this case justifying this distinction. Specifically, there is no evidence demonstrating that the average citizen asking people for their signatures to have a petition placed on the ballot somehow interferes

with the voting process any more (if at all) than individuals conducting exit polls.

This disparate treatment of speakers directly conflicts with this Court's recent ruling in *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856 (Jan. 21, 2010), in which the majority opined:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *United States v. Playboy Entertainment Group, Inc.* (529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Id. at *19. The Court added that "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Id.*

In addition, Respondents have failed to produce any studies or empirical data proving that

the speech activities of individuals who seek to collect signatures for political petitions from people who already have voted justify the 100-foot, no-approach zone imposed by the Florida statute at issue in this case.

Even in the area of commercial speech, which is only subject to intermediate scrutiny rather than the heightened strict scrutiny standard by which laws targeting political expression must be measured,[2] this Court has held that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770-771 (1993). Justice Alito embraced this rigorous level of scrutiny in commercial speech cases while serving on the United States Court of Appeals for the Third Circuit in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).[3]

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[2] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (providing that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest").

[3] In declaring unconstitutional a Pennsylvania statute restricting advertisements for alcohol in college and university newspapers, then Judge Alito wrote for a unanimous three-judge panel that the Commonwealth of

(continued on the following page)

What is more, when it comes to restricting purportedly disruptive speech in public schools, this Court has held that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Under *Tinker*, there must be actual facts suggesting that a substantial or material harm will occur from a student's expression before it may be squelched. *See id.* at 514 ("the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

In summary, the Florida statute at issue restricts political expression, draws impermissible distinctions among citizens engaged in political expression, and is unsupported by evidence demonstrating a real harm from Petitioners' speech activities in post-voting situations that the statute will alleviate to a material degree. The Petition for Writ of Certiorari should be granted so that this Court can clarify the evidentiary standard of proof the State must satisfy in order to permissibly restrict political speech near polling places, and so that this Court can resolve whether distinctions

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Pennsylvania relied only on speculation and conjecture and had not offered any evidence to show the law would be effective. *Pitt News v. Pappert*, 379 F.3d 96, 107-08 (3d Cir. 2004).

between similarly situated speakers near polling places – exit pollsters and exit petitioners – are permissible under the First Amendment.

ARGUMENT

I. Causation of Harm: The Writ Should be Granted So That the Court May Clarify the Evidentiary Standard of Proof That a State Must Meet to Restrict Political Speech Near Polling Places

In delivering the opinion of the Court in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), Justice Scalia wrote that "[t]here are some propositions for which scant empirical evidence can be marshaled." *Id.* at 1813. That indeed may be true when it comes to the alleged effect of fleeting expletives on minors at issue in that case, but it certainly is not the case when it comes to harms allegedly caused by citizens seeking petition signatures after voters exit polling places.

Petitioners' Petition for Writ of Certiorari makes it clear that Petitioners presented the district court with "three different sets of statistical evidence, all of which were gathered during the period when Florida permitted petition circulation and other types of speech within the No Approach Zone." (Petition at 9.)[4] The data demonstrate a

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[4] The Petition for Writ of Certiorari in this case will be cited as (Petition at Pg#.). The Appendix for the Petition for Writ of Certiorari will be cited as (App. at Pg#.).

striking absence of any evidence of harm caused by petition circulation near polling places. (*Id.*)

Without evidence of any harm, this is a law in search of a problem. Respondents could have conducted their own studies and surveys focusing specifically on the differences between alleged disturbances (if any) caused by exit pollsters versus exit petitioners, but they apparently have not done so on the record of this case.

Proof that speech causes some harm must be demonstrated in nearly all areas of First Amendment jurisprudence, even those not demanding strict scrutiny. For instance, in the process of applying the lower standard of intermediate scrutiny to evaluate the constitutionality of government laws affecting the speech of cable system operators, this Court has held that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Even when it comes to regulating the speech of adult bookstores and sexually oriented businesses through zoning laws, government entities must put forth some evidence of harm. In particular:

> a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest [citation omitted]. This is not

> to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002).

Surely if speech-restricting regulations analyzed under the intermediate scrutiny standard and imposed upon the expression of large cable companies, commercial advertisers, and adult businesses must be justified by actual evidence showing real harms, then government entities seeking to regulate the speech of individual citizens who want to gather signatures in order to affect political and legal change must be required to show more proof than legislative reliance on history, conjecture and even common sense. As Justice Souter warned in *Alameda Books*, "we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics." *Id.* at 459 (Souter, J., dissenting).

In the instant matter, Petitioners actually have introduced statistics gathered from public data. (*See* Petition at 9 (stating that one set of data "contained a review of more than 5,000 complaints logged in the Election Incident Reporting System from Florida voters during the 2004 presidential election, none of which involved petition circulation, even though petition circulation was permitted near Florida polling

places at that time").) This would seem to constitute what Justice Stevens recently termed "a good empirical case for skepticism" about the necessity of a Florida law that limits political expression. *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856, at *87 (Jan. 21, 2010) (Stevens, J., dissenting).

The bottom line is this: the precise standard of evidence by which to measure the law at question in the instant case is unclear. The United States Court of Appeals for the Eleventh Circuit in this case even acknowledged that the plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), is not controlling, writing that "[w]e accept that *Burson* does not bind us here; the material facts are different in some ways." (App. at 11a.)

In *Burson*, a plurality of the Court relied on evidence that was largely historical, writing that the "fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them." *Burson*, 504 U.S. at 208. The plurality added that "[e]lections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation." *Id.* at 209.

The Florida law at issue in this case, however, is of very recent vintage and there actually are specific findings of fact about what happened in its absence – namely, an utter absence of any complaints regarding petition circulation.

Despite this, the Eleventh Circuit relied largely on speculation and conjecture when it described the parade of horrors that might befall Florida voters if this law were not in place:

> [I]f exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And we accept it as probable that some – maybe many – voters faced with *running the gauntlet* will refrain from participating in the election process merely to avoid the resulting commotion when leaving the polls.

(App. at 14a-15a (emphasis in original).). While the Eleventh Circuit opinion includes a footnote providing that "the State produced evidence confirming that many Florida voters have complained that their entrance to and exit from the polls is like 'running the gauntlet' and have indicated that 'they will no longer participate in elections unless their access to the polls is better protected by the law,'" (*id.* at 15a n.14), even those voters who might possibly be deterred from showing up in person at a voting station still possess the often-used option of voting by absentee ballot, which is "fully accessible to all voters." *See* Fla. Stat. § 101.662 (2009). *See also* Fla. Stat.

§ 101.62 (2009) (describing the method for obtaining an absentee ballot). Much as consumers today shop online to avoid what they perceive as the hassle of long lines and extra time and effort to go to a store, voters who somehow fear going to and exiting the polls because they might be asked a question about their willingness to sign petitions after voting can easily cast a ballot from the privacy and seclusion of their own home.

The speech of Petitioners is political, not reprehensible. But even when the federal government sought to prohibit the reprehensible speech of virtual child pornography on the grounds that the speech arguably would lead to harm to minors at the hands of pedophiles, this Court struck down that effort, reasoning in part that "the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

The same reasoning has been applied to content-based laws designed to address the alleged harm to children caused by playing violent video games.

In particular, in its 2009 decision in *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit required California to offer "substantial evidence," *id.* at 962 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)), of the state's "purported interest

in preventing psychological or neurological harm," *id.* at 964, to minors who play violent video games. The Ninth Circuit not only engaged in its own examination and analysis of several studies offered by California, but it suggested that proof of harm causation – not merely correlation – was required:

> Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific certainty," the State must come forward with more than it has.

Id. at 963-64.

Just one year earlier, the United States Court of Appeals for the Eighth Circuit in *Entertainment Software Association v. Swanson,* 519 F.3d 768 (8th Cir. 2008), went even further on the evidentiary burden in striking down a Minnesota law targeting violent video games when it held "that the evidence falls short of establishing

the statistical certainty of causation demanded." *Id.* at 772.

In the instant case, the speech in question is not low value speech like virtual child pornography or violent video games. Likewise, the target or victim of the speech is not children. Rather, the speech is political and the people who allegedly are harmed by it are adults. If proof of causation of harm is required to stop speech aimed at harming minors, then surely at least the same level of proof of causation of harm is required to prove that adults asking other adults if they want to sign a petition causes them harm.

Perhaps what Florida really is worried about is *conduct* – people pushing, touching, shoving, and otherwise physically interfering with citizens after they have voted and are exiting polling places. That, of course, can be restricted without raising First Amendment concerns and without stopping Petitioners from civilly asking a question about the willingness of an individual to sign a petition.

In summary, it is unclear what evidentiary standard must be imposed upon Florida to justify the law at issue. Even when the intermediate scrutiny standard is applied in areas such as commercial speech, government entities must prove that the alleged harms are real. For content-based laws like the one in this case, the burden should be higher and, in fact, federal courts have in some instances required government entities to show direct causation of harm through empirical data. Indeed, "in recent freedom of expression

cases, the [Supreme] Court is increasingly turning its attention to the quality and quantity of proof of the causal link between speech and harm." Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 Wm. & Mary Bill of Rts. J. 125, 197 (2004).[5] That trend should not be disrupted in this case.

Ultimately, in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), this Court noted that "[t]he quantum of empirical evidence

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[5] After an extensive examination of this Court's First Amendment-based opinions, Huhn asserts that:

> Over the last decade there has emerged a simple and striking trend in the reasoning of the Supreme Court regarding freedom of expression. Instead of focusing on the right to freedom of expression, the Court is increasingly turning its attention to an analysis of the harm that may result from allowing the speech to remain unregulated. In place of analyzing what the law is, the Court is attempting to determine the facts that would justify regulation of speech. Rather than conducting a legal analysis, the Court is engaging in an empirical inquiry.

Id. at 194. *See also* Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 Pepp. L. Rev. 317, 359-60 (2009) (asserting that "the linkage requirements – the doctrinal rules that express the required connection between the potentially dangerous utterance and the ensuing harm – have tightened" in First Amendment jurisprudence during "the last several decades").

needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. Is it really plausible that the Petitioners who actually *want* people to sign their political petition will harass them? That surely would be an odd and counterintuitive way to get people to sign petitions. The much more plausible tactic, of course, would involve asking them politely to sign a petition. The Court should now grant the Petition for a Writ of Certiorari in order to define clearly the precise "quantum of empirical evidence" by which government entities must justify restrictions on citizens seeking to ask other citizens if they would be willing to sign a petition after leaving a polling place.

II. Disparate Treatment of Speakers: The Writ Should be Granted to Resolve Whether the Florida Statute Draws Impermissible Distinctions Between Similarly Situated Speakers

You can ask a person for whom they just voted, but you cannot ask a person for his or her signature on a petition.

That is what the disparate treatment of individual speakers enforced by Respondents boils down to under Florida Statutes Section 102.031(4)(a)-(b) (2008). It is disparate treatment based on the content of their political speech, and laws that discriminate against speakers based on the content of their messages are subject to strict

scrutiny. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (a "content-based speech restriction" is permissible "only if it satisfies strict scrutiny," which requires that the law in question "be narrowly tailored to promote a compelling Government interest"); *Sable Commc'ns Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

As this Court recently observed in *Citizens United v. FEC*, --- S. Ct. ---, 2010 WL 183856 (Jan. 21, 2010), there is a fundamental right of all citizens under the First Amendment to ask questions related to political matters. *See id.* at *18 (observing that "*the right of citizens to inquire*, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it") (emphasis added). Even more importantly, the Court explained that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others," reasoning that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at *19.

Significantly, this case involves the disparate treatment of speakers affecting the power of direct democratic speech of the average citizen, often as he or she attempts to counter more

financially endowed entities, like corporations. "[T]he Founding Fathers of the United States diverged from contemporary European models and focused on the power of the people." K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 824 (2006). This case, in a nutshell, revolves around the disparate treatment of the proverbial "little person" as he or she seeks to facilitate change through the collection of the signatures of registered voters in an economic and efficient manner at polling places.

This Court wrote nearly thirty years ago in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), that:

> the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort

> individuals can make their views known, when, individually, their voices would be faint or lost.

Id. at 294.

This statement captures the essence of what Petitioners in the instant case seek to do with their speech by gathering signatures in order to effectuate legal change. The Court should thus consider if there are any important differences that justify or support such disparate treatment by the State of Florida of individuals based upon the content of their speech and, specifically, the question or questions they seek to ask while standing in the same location.

As a starting point, one query – "For whom did you vote?" – is not any more intrusive than the other – "Would you be willing to sign a petition for X?" In fact, to the extent that the actual casting of a vote is a private activity, while the signing of a petition is a public statement of support or endorsement, those conducting exit polls would seem to ask the more personal questions. *See* Fla. Stat. § 101.71(1) (2009) (an "adequate provision shall be made for the privacy of the elector while casting his or her vote"). Indeed, this Court granted a petition for a writ of certiorari in January 2010 in *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) *cert. granted*, 78 U.S.L.W. 3295 (U.S. Jan. 15, 2010) (No. 09-559), to determine whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying

information about petition signers. The instant case provides a propitious and similar opportunity to clarify scrutiny and evidentiary standards regarding political petitions.

Second, it is far from clear that the question of the exit pollster is somehow more important or valuable to democracy than the question of the petition-signature collector. The speech of the exit pollster may allow predictions about the pending results of elections, but the speech of the petition-signature collector allows citizens to enact future legal changes and participate in the democratic process. As this Court has recognized, "the values in the right of petition as an important aspect of self-government are beyond question." *McDonald v. Smith*, 472 U.S. 479, 483 (1985).

Third, the citizen who has just exited a polling place after casting a vote is under no obligation or compulsion to speak to either exit pollsters or exit petitioners. He or she simply can keep on walking right past them both.

Related here is a fourth point – those leaving polling places are no longer in private places (voting booths) and they do not possess an expectation of privacy outside of the voting station that shields them from speech that they would rather not hear. If this Court protected the words "Fuck the Draft" inside the hallways of a public courthouse despite the fact that they might offend the sensibilities of some inside the building, then it seems logical to protect the speech, on a public sidewalk or driveway or parking lot outside of a

polling place, of a person who politely asks a question. *See Cohen v. California*, 403 U.S. 15, 21-22 (1971) (noting that "persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home").

Fifth, neither exit pollsters nor exit petitioners typically wield anything more menacing when conducting their speech-related activities than a clipboard, paper, identifying information or electronic data collector. Exit petitioners would not seem to be a particularly more intimidating or threatening presence than exit pollsters.

Ultimately then, all that Florida is left with in its effort to demonstrate a difference between the speakers – exit pollsters and exit petitioners – is a "gaping empirical hole." *Citizens United*, --- S. Ct. ---, 2010 WL 183856 at *56 (Stevens, J., dissenting). The only difference between the speakers is the content of their message, and as this Court has made clear, "[r]egulations which permit the Government to discriminate on the

basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

This Court recently reiterated the long-standing First Amendment principles that "speech is an essential mechanism of democracy" and that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, --- S. Ct. ---, 2010 WL 183856, at *19. It is by design that Florida Statutes Section 102.031(4)(a)-(b) (2008) snuffs out the speech of individuals seeking signatures for petitions but not those claiming to conduct exit polls. One knows it was by design simply because, as Petitioners describe in their brief, the exemption allowing exit pollsters within the 100-foot, no approach zone was carved out by an amendment to the statute at issue in 2008. (Petition at 6-7.) Prior to that exemption, exit pollsters were subject to the same rules as exit petitioners under the Florida law adopted in 2005. *See* Fla. Stat. § 102.031(4)(a)-(b) (2006).

This move is especially odd because it comes when "[t]he use of direct democracy is at its highest level in more than one hundred years." Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 Vand. L. Rev. 395, 396 (2003).

Indeed, "[t]he tools of direct democracy – the initiative, the referendum, and the recall – developed as ways to amplify the voices of ordinary

people and to counter the influence of entrenched interests with clout to shape the traditional legislative process." Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1846 (1999).

The right to petition the government, as protected by the First Amendment, has a long history and should not be lightly treaded upon by the government:

> The principle that there is a fundamental right to petition government for redress of grievances has a long history. It was recognized in the Magna Carta in 1215, and in subsequent centuries its importance was repeatedly reaffirmed. The principle was transported to America, in part via charters for colonial government, where it became firmly embedded in the American political and legal system. Petitioning was a primary source of bills in pre-constitutional America.

Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. Colo. L. Rev. 129, 130 (1995).

Amici are aware of no similar historical and well-established tradition of exit polling dating back to the Magna Carta, yet Florida nonetheless privileges and protects it over the right of those

citizens collecting signatures for petitions to change the law.

CONCLUSION

For all of these reasons, which strike at the heart of political speech, democracy, the political process and the First Amendment rights of speech and petition, *amici curiae* respectfully request that this Court grant Petitioners' Petition for a Writ of Certiorari.

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